

# **BCI Exhibit 635**

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2                   UNITED STATES BANKRUPTCY COURT  
3                   SOUTHERN DISTRICT OF NEW YORK

4                   -----x

5    In Re:

6                   Chapter 11

7    LEHMAN BROTHERS                   Case No. 08-13555(JMP)  
8    HOLDINGS, INC., et al,           (Jointly Administered)

9                   Debtors.

10                   -----x

11

12                   DEPOSITION OF EDWARD J. ROSEN

13                   New York, New York  
14                   February 19, 2010

15

16    Reported by:

17    MARY F. BOWMAN, RPR, CRR  
18    JOB NO. 28461

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4  
5 February 19, 2010  
6 9:35 a.m.  
7

8 Deposition of EDWARD J. ROSEN, held at  
9 the offices of Cleary, Gottlieb, Steen &  
10 Hamilton, LLP, One Liberty Plaza, New York, New  
11 York, before Mary F. Bowman, a Registered  
12 Professional Reporter, Certified Realtime  
13 Reporter, and Notary Public of the State of New  
14 York and New Jersey.  
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2 APPEARANCES:  
3  
4 JONES DAY, LLP  
5 Attorneys for Lehman Brothers, Inc.  
6 222 East 41st Street  
7 New York, New York 10017-6702  
8 BY: ROBERT W. GAFFEY, ESQ.  
9  
10  
11 BOIES, SCHILLER & FLEXNER, LLP  
12 Attorneys for Barclays and The Witness  
13 5301 Wisconsin Avenue, NW - Suite 800  
14 Washington DC 20015  
15 BY: HAMISH HUME, ESQ.  
16  
17  
18 QUINN, EMANUEL, URQUHART, OLIVER & HEDGES, LLP  
19 Attorneys for the Creditors Committee  
20 51 Madison Avenue - 22nd Floor  
21 New York, New York 10010  
22 BY: ROBERT DAKIS, ESQ.  
23  
24  
25

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1  
2 APPEARANCES:  
3  
4 HUGHES, HUBBARD & REED, LLP  
5 Attorneys for the SIPA Trustee  
6 One Battery Park Plaza  
7 New York, New York 10004-1482  
8 BY: WILLIAM R. MAGUIRE, ESQ.  
9 AMINA HASSAN, ESQ.  
10  
11 CLEARY, GOTTLIEB, STERN & HAMILTON, LLP  
12 Attorneys for the witness  
13 One Liberty Plaza  
14 New York, New York 10006  
15 BY: BOAZ S. MORAG, ESQ.  
16 ROBERT P. DAVIS, ESQ.  
17  
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5 IT IS HEREBY STIPULATED AND AGREED, by  
6 and between the attorneys for the respective  
7 parties herein, that filing and sealing be  
8 and the same are hereby waived.  
9  
10 IT IS FURTHER STIPULATED AND AGREED  
11 that all objections, except as to the form  
12 of the question, shall be reserved to the  
13 time of the trial.  
14  
15 IT IS FURTHER STIPULATED AND AGREED  
16 that the within deposition may be sworn to  
17 and signed before any officer authorized to  
18 administer an oath, with the same force and  
19 effect as if signed and sworn to before the  
20 Court.  
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1 ROSEN  
2 (Exhibit 622, declaration of Edward J.  
3 Rosen marked for identification, as of this  
4 date.)  
5 EDWARD J. ROSEN,  
6 called as a witness by the parties,  
7 having been duly sworn, testified as follows:  
8 EXAMINATION BY  
9 MR. MAGUIRE:  
10 Q. As you know, my name is Bill Maguire  
11 with Hughes, Hubbard & Reed. I am here with my  
12 colleague Amina Hassan. We represent James  
13 Giddens, the SIPA trustee.  
14 We are going to ask you some  
15 questions. If any questions are unclear, let me  
16 know. If you need to take a break at any time,  
17 just let me know.  
18 I will show you a document we have  
19 marked as Exhibit 622. If you can tell me what  
20 that document is, sir.  
21 A. It looks like my declaration, pursuant  
22 to Rule 30(b)(6).  
23 Q. You have mentioned in the second  
24 paragraph that you specialize in derivatives.  
25 Do you see that?  
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1 ROSEN  
2 A. Yes.  
3 Q. Can you tell me what -- the  
4 derivatives that Barclays acquired in the  
5 transaction that's the subject of this, did that  
6 include any futures contracts?  
7 MR. MORAG: Object to the form.  
8 A. It did, it did include the acquisition  
9 of the futures business.  
10 Q. And did that futures business include  
11 any positions?  
12 A. I don't know. I don't know what  
13 positions were actually on. We didn't handle  
14 the futures side of the arrangements. Those  
15 were handled by S&C, by and large.  
16 Q. Did you have an understanding whether  
17 any futures contracts were included in the  
18 acquisition by Barclays?  
19 MR. MORAG: Object to the form.  
20 A. Yes. I believe, my understanding was  
21 that there were futures positions and listed  
22 options positions.  
23 Q. And what kinds of futures and options  
24 contracts did you understand Barclays to be  
25 acquiring in this transaction?  
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1 ROSEN  
2 A. I'm not sure I understand the  
3 question, what type of futures options.  
4 Q. Were they exchange-traded or over the  
5 counter?  
6 A. Yes, yes, listed. Not over the  
7 counter. My understanding was the  
8 over-the-counter business was excluded.  
9 Q. Did you have an understanding how  
10 Lehman organized its derivatives business?  
11 A. No.  
12 Q. When did you become involved in the  
13 transaction?  
14 A. My recollection was sometime around  
15 the 15th of September, maybe the 14th of  
16 September.  
17 Q. And what was your role?  
18 MR. MORAG: Time frame? At the start?  
19 Q. Starting on the 15th.  
20 A. On the 15th, going forward, I was both  
21 dealing with certain of the deal issues relating  
22 to the regulated character of the transaction,  
23 and also dealing with certain regulators on  
24 issues that needed to be addressed if the deal  
25 was going to be closed.  
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1 ROSEN  
2 That's primarily what I was doing, but  
3 also the clearinghouse issues that arose and the  
4 JP Morgan issues that arose, I had some  
5 involvement in, as events unfolded between then  
6 and the 22nd.  
7 Q. When you say the clearinghouse, are  
8 you referring to DTCC?  
9 A. And OCC.  
10 Q. What regulators did you deal with?  
11 A. I spoke with the SEC. I did have one  
12 or two conversations with staff at FINRA, and I  
13 had a couple of conversations with folks at the  
14 Federal Reserve.  
15 Q. With whom did you deal at the SEC?  
16 A. I had conversations with Mike  
17 Macchiaroli, Randall Roy, and Dan Gallagher.  
18 Q. What were the subject of your  
19 conversations with Mike Macchiaroli?  
20 A. There were a couple of issues. The  
21 principal issue related to the fact that Lehman  
22 operated under a different -- was registered  
23 under a different broker dealer regulatory  
24 regime with different capital requirements than  
25 Barclays, and there were questions about how  
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1 ROSEN

2 capital would be computed in the face of the  
3 combination of those two entities.

4 **Q. What was the outcome of those  
5 discussions?**

6 A. The outcome of those discussions was  
7 that the SEC confirmed that following the  
8 combination -- it is a little bit complicated,  
9 but in essence, that the surviving entity could  
10 take advantage of the regulatory status that the  
11 LBI broker dealer enjoyed with potential  
12 accommodations being made for systems  
13 integration, things like that. Because you have  
14 systems to compute capital and they were  
15 disparate systems.

16 **Q. Notwithstanding Barclays' acquisition  
17 of the North American business, the acquired  
18 business would remain subject to the previous  
19 regulatory capital regime?**

20 A. It would actually be sort of a  
21 combination of the two, but would ultimately, to  
22 the extent that the systems were able to  
23 consolidate, it could be operated under the same  
24 regime, yes.

25 **Q. Did you have any discussions with**

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1 ROSEN

2 **Mr. Macchiaroli specifically about the amount of  
3 capital that would be required to operate the  
4 acquired business?**

5 A. The amount of capital? There was a  
6 conversation about whether or not there would be  
7 combined tentative net capital, I believe, of  
8 5 billion dollars, and I believe the view was  
9 that there would be adequate tentative net  
10 capital.

11 **Q. What was your understanding as to what  
12 tentative net capital meant?**

13 A. It's a calculation before certain  
14 deductions for various positions and associated  
15 risks of a market credit nature. I should add I  
16 am not an expert on capital computations.

17 **Q. Is what you are describing an  
18 understanding that was reached between Barclays  
19 and the SEC, that there would be a tentative net  
20 capital of 5 billion dollars following the  
21 acquisition to support the acquired business?**

22 A. I don't recall it being an express  
23 condition or agreement. And I think, I think  
24 people possibly operated under the assumption  
25 that there would be adequate tentative net

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1 ROSEN

2 capital as a result of the combination.

3 **Q. Do you know whether any such  
4 understanding was documented?**

5 A. There was language -- there was an  
6 undertaking, which I don't recall the terms of,  
7 there was an undertaking that was provided by  
8 Barclays to the SEC, because there hadn't  
9 been -- usually you go through a formal process  
10 in order to become part of this regime, and  
11 there was a document. I don't recall its  
12 contents sitting here now.

13 **Q. Who prepared that undertaking?**

14 A. That was I believe prepared at  
15 Barclays.

16 **Q. Who is the person on the Barclays side  
17 who was responsible for the net capital  
18 discussions with the SEC?**

19 A. That, I mean, I don't know. I, I  
20 believe, corresponded with Jonathan Hughes and  
21 Alan Kaplan on those issues. I don't know who  
22 they may have coordinated with internally.

23 **Q. Was there any discussion with Mike  
24 Macchiaroli about where Barclays would get the  
25 5 billion tentative net capital?**

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1 ROSEN

2 MR. MORAG: Object to the form.

3 A. No. Not that I recall, I should say.

4 **Q. Was there any discussion with Mike  
5 Macchiaroli as to whether the acquired business  
6 itself would be a source of the capital needed  
7 to support its future operations?**

8 A. Could you ask the question again.

9 **Q. Yes. Was there any discussion with  
10 Mike Macchiaroli about whether Barclays would  
11 obtain the capital to support the business from  
12 the business itself?**

13 A. I don't recall discussing with him  
14 what the source of the tentative net capital  
15 would be.

16 **Q. Was there any discussion with Mike  
17 Macchiaroli about day one gain, profit that  
18 Barclays expected to make on the acquisition?**

19 MR. MORAG: Objection, foundation,  
20 lack of foundation.

21 A. I don't recall having a conversation  
22 with Mike Macchiaroli about that.

23 **Q. Do you recall any such conversation  
24 with anyone at the SEC, including Randall Roy or  
25 Dan Gallagher?**

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1 ROSEN

2 A. Remind me again, any conversation  
3 regarding --

4 **Q. About Barclays anticipating making a  
5 day one gain or profit on the acquisition of the  
6 business.**

7 A. I don't recall participating in or  
8 being aware. It doesn't mean that there weren't  
9 conversations. I was not a party to them.

10 **Q. Were you aware at any point that  
11 Barclays did anticipate a day one gain or profit  
12 on the acquisition of the Lehman business?**

13 MR. MORAG: Objection to form and  
14 foundation.

15 A. I don't recall having conversations  
16 about the accounting treatment for the  
17 transaction. So I couldn't say.

18 **Q. And leaving aside accounting  
19 treatment, in terms of economic gain, were you  
20 ever aware that Barclays was anticipating an  
21 economic gain from the transaction?**

22 MR. MORAG: Objection to the form.

23 Time frame.

24 A. I'm not sure what you mean by an  
25 economic gain. I do know that they wouldn't

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1 ROSEN

2 have done this transaction if they didn't think  
3 that it would have been profitable for them to  
4 do over the long term. I think they were making  
5 a major bet on their North American investment  
6 banking activities and taking a significant risk  
7 at the same time.

8 **Q. But you have no further knowledge  
9 beyond that general understanding? And to help  
10 you, I am specifically talking not about a  
11 long-term gain or the expected performance of  
12 the business after the closing, I'm talking  
13 about whether Barclays anticipated that the  
14 total economic value of what it was getting in  
15 the deal would exceed what it was paying, such  
16 that it would record an immediate economic value  
17 in favor of Barclays at the closing?**

18 A. No, but I don't think my involvement  
19 in the transaction would have necessarily  
20 positioned me to be part to those discussions.  
21 If they were to be had, they probably would have  
22 been with other people.

23 **Q. Certainly that was not a subject that  
24 was discussed in any of your discussions with  
25 the regulators?**

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1 ROSEN

2 A. I don't recall having a conversation  
3 with the regulators regarding the details of  
4 the -- you know, how the transaction would be  
5 reflected on Barclays' books and records. It  
6 was not part of my role in the transaction, I  
7 guess.

8 **Q. Can you tell me any other subjects  
9 that you discussed with Mike Macchiaroli?**

10 MR. MORAG: Please try to keep your  
11 voice up for the court reporter.

12 A. Conversations with Mike Macchiaroli.  
13 I'm sorry. I'm trying to remember certain  
14 subjects and who I would have spoken with about  
15 them.

16 I did have conversations with Mike  
17 Macchiaroli about sort of generally how things  
18 were going, because he was, from what I  
19 understood, the -- at Lehman presiding over sort  
20 of developments there. And we might have had --  
21 we had conversations from time to time, and we  
22 may have spoken about how things looked from his  
23 perspective, and while I don't remember the  
24 specifics of the exchange that we had, I do  
25 remember coming away from the conversation with

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1 ROSEN

2 Mike, was, you know, not committal, and I think  
3 he was struggling to stay on top of all the  
4 information that he needed to figure out sort of  
5 where the books and records were, but I do  
6 remember coming away with the impression that he  
7 was optimistic that the assets there were going  
8 to be adequate for covering the customer claims,  
9 which was good, because everybody was hoping  
10 that there weren't going to be any obstacles.

11 I may have had other conversations,  
12 but I can't recall other conversations that I  
13 necessarily had with Mike.

14 **Q. Any other conversations you recall  
15 with anyone else at the SEC?**

16 A. Yes. I did have a conversation with  
17 Dan Gallagher at one point which related to an  
18 issue that I was not directly negotiating about  
19 the PIM accounts and what was coming across and  
20 what was not, and I had a conversation with  
21 Randall Roy about some additional relief that  
22 Barclays -- that Barclays identified relating to  
23 the Fed's request that Barclays step into its  
24 shoes in the repos that were outstanding with  
25 the Fed, and I can't remember, I can't remember

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2 for sure all the people at the SEC who I might  
3 have spoke with, but we did request that the SEC  
4 agree to waive certain rights that they might  
5 otherwise have been entitled to exercise that  
6 might have prevented Barclays from exercising  
7 its rights under the repo should the deal not go  
8 through. But I honestly can't remember the  
9 details of that. We did ultimately get that  
10 assurance.

11 And I had a conversation with Bob  
12 Colby, who contacted me because there was a  
13 miscommunication among the representatives of  
14 the clearing organization, OCC, and the SEC, and  
15 there was some suggestion that the SEC was  
16 imposing a requirement on Lehman that would have  
17 prevented Lehman from taking the accounts at  
18 OCC -- I am sorry, I mean Barclays, take the  
19 accounts under the TAA, and I spoke to him  
20 regarding that, and it took a little bit of  
21 time, but it was identified as a  
22 misunderstanding on the part of outside counsel  
23 to OCC. So that issue disappeared.

24 **Q. Besides that misunderstanding and  
25 besides the PIM accounts and the repo and**

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1 ROSEN

2 **capital requirements, any other subjects you  
3 recall discussing with the SEC?**

4 A. I may have had a number of others. I  
5 honestly just don't remember them, sitting here  
6 now.

7 You know, I can't remember how far my  
8 conversations went with this, but one of the  
9 questions presented by the transaction was how  
10 the Lehman business would be acquired and what  
11 entity, and there are different regulatory  
12 consequences if it is acquired by a going broker  
13 dealer that is already registered than if it was  
14 acquired by a new entity that doesn't enjoy a  
15 registration.

16 And there was thinking going on as to  
17 the various pros and cons to how the transaction  
18 was to be booked -- what entity might take it,  
19 and I recall spending some time trying to get  
20 the approval to be able to close the deal if we  
21 needed to with the Lehman business being  
22 acquired by an affiliate or subsidiary of the  
23 registered broker dealer, rather than the  
24 registered brother teller itself.

25 That ultimately was not necessary, but  
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1 ROSEN

2 I believe I spent some time dealing with that  
3 issue.

4 **Q. Do you know which entity acquired the  
5 PIM business?**

6 A. Do I know which entity acquired the  
7 PIM business. I had thought -- I thought or  
8 assumed that it was Barclays Capital, Inc.

9 **Q. Can you tell me what is or was the PIM  
10 business?**

11 MR. HUME: Object to the form.

12 A. I believe it is a business in which  
13 investment management services are provided by  
14 Lehman brokers to customers. I don't know more  
15 than that. I don't know the business plan, I  
16 don't know the scope of it.

17 **Q. Did you understand that it was part of  
18 the investment management business, the  
19 investment management division?**

20 A. I don't know structurally how it fit  
21 into Lehman's organization.

22 **Q. Do you know whether the customers of  
23 the PIM business did any trading in derivatives?**

24 A. I don't -- I didn't have specific  
25 knowledge as to whether they did or didn't. I  
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1 ROSEN

2 assume it would be possible that they did.

3 **Q. In paragraph 3 of your declaration,  
4 you note the basis for your declaration in the  
5 first sentence.**

6 A. Yes.

7 **Q. And you refer to the recollection of  
8 your partners. Can you tell me to whom you are  
9 referring there?**

10 A. It would have included Mr. Davis, and  
11 Lindsee Granfield, Duane McLaughlin, David  
12 Leinwand, L-E-I-N-W-A-N-D.

13 Dana Fleischman, Vic Lewkow, Boaz  
14 Morag. I feel like I am forgetting somebody.

15 MR. MORAG: Washington?

16 A. I am sorry, and Mike Mazzuchi, a  
17 partner in the Washington office. Thank you.  
18 He participated by phone, so I didn't remember  
19 him.

20 **Q. Everyone else participated in person?**

21 A. Not necessarily. In some cases -- for  
22 example, I think Duane McLaughlin was out of  
23 town and may have called in.

24 **Q. How did you go about collecting the  
25 recollection of these partners?**

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1 ROSEN

2 A. Talking about the 30(b)(6) issues and  
3 discussing our recollection of them.

4 **Q. Can you tell me when that happened?**

5 MR. HUME: I am just going to object,  
6 because I think the record is unclear  
7 whether your question is about recollections  
8 reflected in the affidavit versus 30(b)(6)  
9 prep.

10 **Q. Did you distinguish between preparing,  
11 getting your recollections for your declaration  
12 and your recollections for your deposition, or  
13 was that all part of the same process where you  
14 were preparing to testify either by way of  
15 declaration or by way of deposition?**

16 A. Well, obviously the discussions were  
17 held earlier with respect to the declaration,  
18 sometime during the week leading up to the  
19 completion of the declaration. I don't recall  
20 whether Duane McLaughlin or Dana Fleischman  
21 participated in those earlier discussions.

22 **Q. They did, however, participate in  
23 another round of similar discussions --**

24 A. After the declaration.

25 **Q. -- after the declaration.**

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1 ROSEN

2 **And when was that? Was that just in  
3 the last week?**

4 A. The week before, primarily. And  
5 yesterday, but only a small subset.

6 **Q. And how did you actually get the  
7 recollection from the partners? How did you  
8 find out what they remembered?**

9 A. I'm not quite sure I understand the  
10 question. We talked amongst ourselves about the  
11 events and our recollections of them covered by  
12 the 30(b)(6).

13 **Q. Did any of your partners remember  
14 things that you did not remember?**

15 A. I would say yes, we all had different  
16 recollections.

17 **Q. Now, you note in your declaration,  
18 paragraph 3, you say, "Where indicated, the  
19 recollection of my partners." Do you see that?  
20 It's on the second line of paragraph 3.**

21 A. Um-hm. I do see that.

22 **Q. Is there any recollection that any of  
23 your partners gave you that you did not set  
24 forth in this declaration?**

25 MR. MORAG: Objection to form and  
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1 ROSEN

2 objection on the attorney/client privilege  
3 and work product.

4 MR. MAGUIRE: Are you objecting or  
5 directing the witness not to answer?

6 MR. MORAG: If I understand your  
7 question correctly, I'm directing him not to  
8 answer.

9 **Q. In paragraph 4, sir, you refer to the  
10 removal of certain language. Do you see that?**

11 A. Yes.

12 **Q. And you note specifically the draft  
13 that it was removed from.**

14 A. I am sorry.

15 **Q. You refer to language -- you refer to  
16 a draft that contained that language?**

17 A. Yes.

18 **Q. And the draft language that you are  
19 referring to, you set that forth in paragraph 5;  
20 is that correct?**

21 A. I am sorry, in paragraph 4, I don't  
22 see a reference to paragraph 5.

23 **Q. That's correct. In paragraph 4, you  
24 refer to the removal of certain language.**

25 A. Yes. I am sorry. You are referring

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1 ROSEN

2 to paragraph 5 of the declaration, not  
3 paragraph -- OK, could you repeat the question.

4 **Q. I just want to make sure we are on the  
5 same page here. You're -- when you talk about  
6 the certain language in paragraph 4, you are  
7 referring to the language that you set forth in  
8 quotes in paragraph 5 of your declaration?**

9 A. Yes. This is a reference to the  
10 language in 1D.

11 MR. MORAG: Let me note for the record  
12 that the quoted language in paragraph 5 does  
13 have ellipses and was not intended to be a  
14 full quote.

15 **Q. As a matter of reference, we are  
16 talking about the same language?**

17 A. Yes.

18 **Q. At the end of paragraph 4, you say  
19 that the trustee's position is incorrect, and  
20 you say, "There was to my or my partners'  
21 knowledge never any such agreement or  
22 discussion." Do you see that?**

23 A. Yes.

24 **Q. Sir, was there any discussion, to your  
25 knowledge, or to the knowledge of your partners,**  
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1 ROSEN  
2 with anyone, about the removal of the language  
3 that you discuss in paragraphs 4 and 5 of your  
4 declaration?

5 MR. MORAG: Object to the form, and to  
6 the extent -- you can answer to the extent  
7 you're going to talk about discussion with  
8 anyone in the Lehman side.

9 THE WITNESS: Yeah, I know, it's fine.

10 A. The only -- I -- the answer is, I  
11 don't recall the specific content of the  
12 discussion. But in response to that language,  
13 there was -- there was additional language that  
14 we drafted that was provided and identified to  
15 Lehman's attorneys explaining that this language  
16 was needed in light of the changes that had been  
17 made to 1D.

18 Q. And is that, sir, your recollection or  
19 the recollection of one of your partners?

20 A. Well, we gave -- it is our collective  
21 recollection that we drafted the additional  
22 language, and it was our recollection that we  
23 provided that in the form of a handwritten  
24 markup, and I don't recall, and I'm not sure any  
25 of my partners specifically recall, who actually

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1 ROSEN

2 A. I don't know.

3 Q. Do you know whether, in fact, you did  
4 give them to somebody or what you did with those  
5 handwritten notes?

6 A. My recollection is that I handed them  
7 to one of my partners.

8 Q. Do you know which partner you handed  
9 them to?

10 A. I don't recall specifically.

11 Q. Do you have a general recollection?

12 A. I have a general recollection, it  
13 would have been Bob Davis or Duane McLaughlin or  
14 David Leinwand. It would have been one of those  
15 three.

16 Q. Have you asked your partners for that  
17 draft?

18 A. No, I haven't.

19 Q. Do you know whether anyone has  
20 attempted to locate that draft?

21 A. I don't know.

22 Q. Did you talk to anyone on the Lehman  
23 side concerning the insertion of the  
24 parenthetical that you were proposing in that  
25 draft?

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1 ROSEN  
2 handed the markup over to the Lehman side, but  
3 it was provided to the Lehman side in the form  
4 of handwritten comments.

5 Q. And the handwritten comments, are  
6 those the ones that included the parenthetical  
7 "property held to secure"?

8 A. Yes, yes.

9 Q. Have you seen those handwritten  
10 comments?

11 MR. MORAG: Time frame?

12 Q. At any time?

13 A. You mean including at the time that  
14 they were drafted?

15 Q. Yes.

16 A. The recollection of the group was that  
17 I drafted them.

18 Q. Do you recall actually what you did  
19 with those handwritten notes?

20 A. I would have given them to one of my  
21 partners.

22 Q. Have you seen them since the weekend  
23 when those notes were prepared?

24 A. No, no, I have not.

25 Q. Do you know whether they exist today?

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2 A. Did I personally speak to anyone on  
3 the Lehman side? Well, it depends upon -- I am  
4 sorry, I personally did not speak to anyone on  
5 the Lehman side.

6 Q. Do you know whether any of your  
7 partners spoke to anyone on the Lehman side  
8 about including that parenthetical in the  
9 clarification letter?

10 A. Our understanding, our recollection,  
11 Cleary's recollection, is that it would have  
12 been -- it would have been identified as a  
13 change to be made to the agreement, to the --  
14 whoever the lawyer was on the -- representing  
15 Lehman that was handling the document.

16 Q. And do you know who the lawyer on the  
17 Lehman side was to whom it was handed?

18 A. I don't know. I don't know.

19 Q. And the draft that was handed to that  
20 Lehman lawyer, did it have any other handwritten  
21 changes?

22 A. I'm trying to remember. There were  
23 two other changes that I recall, and you will  
24 have to forgive me for being a little bit  
25 unclear about the timing or the sequencing, but

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2 I believe there were two other changes.  
3 One, there was language -- let me back  
4 up and ask you this question and get  
5 clarification. Are you asking me just about the  
6 language that's described in 1D, or are you  
7 asking about other changes to the clarification  
8 letter?

9 **Q. Let's get our time frame and context**  
10 **together first. I'm talking to you specifically**  
11 **about the draft that I understand from your**  
12 **testimony in which you, in handwriting, inserted**  
13 **the parenthetical that includes the words "and**  
14 **property held to secure."**

15 A. Yes.

16 **Q. And the question is whether that draft**  
17 **included any other proposed changes.**

18 A. I'd have to go back and look at the  
19 sequence of the drafts. There were two other  
20 changes that may or may not have been  
21 simultaneous. I don't know. They may have been  
22 given sequentially but have been processed by  
23 the other side as part of one turn. I don't, I  
24 don't recall.

25 But there was a change in the

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2 clarification of language concerning 15c3-3,  
3 provision to add the word "or value" at the end  
4 of a sentence, and there was a sentence to  
5 clarify what had been agreed as part of the  
6 resolution of issues with DTC, that the  
7 liabilities to DTC associated with Lehman were  
8 excluded liabilities under the APA.

9 **Q. I am going to ask you again**  
10 **specifically about the draft in which you**  
11 **inserted that parenthetical "property held to**  
12 **secure."**

13 **With respect to that draft, can you**  
14 **tell me what, if anything, was said about anyone**  
15 **on the Barclays side or the Cleary side to the**  
16 **person on the Lehman side who received that**  
17 **draft?**

18 A. No, I can't give you verbatim what  
19 would have been said, but what would ordinarily  
20 happen in that circumstance is that the changes  
21 would be identified to the other side so they  
22 could understand what was being provided to  
23 them.

24 **Q. And when you say the changes would be**  
25 **identified, the other side would be shown what**

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2 **the proposed language was?**

3 A. Yes. We did not control the  
4 documents, so Cleary did not input those  
5 changes. Those changes were put into whatever  
6 revised draft emerged in whatever time it  
7 emerged by the Lehman's counsel.

8 **Q. Other than pointing out the changed**  
9 **language, do you know what, if anything, was**  
10 **said to Lehman about the addition of that**  
11 **parenthetical?**

12 A. No. Not at that time.

13 **Q. When you say not at that time, is**  
14 **there some other time that there was a**  
15 **discussion --**

16 A. Not about that specific parenthetical  
17 but about the subject, there were a lot of --  
18 there were exchanges of a number of  
19 communications and documents that I think were  
20 addressed to the same issue that were exchanged.

21 **Q. I would like to go through some of**  
22 **them, and the first one I'd like to take is the**  
23 **one that you refer to in paragraph 4. And**  
24 **that's the draft language that you have put**  
25 **forth in quotes in paragraph 5.**

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2 **And if we get our sequence right,**  
3 **there was a draft that included this language**  
4 **which has an express reference to margin, and**  
5 **that's the language you have set forth in**  
6 **paragraph 5, right?**

7 A. I am sorry, could you repeat the  
8 question about this language.

9 **Q. Yes. Let's get our context right**  
10 **first.**

11 **I invite you to look at paragraph 5**  
12 **and look at the draft language that you have,**  
13 **starting with the quotes, "any and all**  
14 **property."**

15 A. I am sorry, where are you in  
16 paragraph 5?

17 **Q. About midway down, the second full**  
18 **sentence: "The draft language accomplished this**  
19 **by making clear that the definition of excluded**  
20 **assets did not include 'any and all property,'"**  
21 **and it continues.**

22 A. Correct.

23 **Q. So for my next couple of questions, I**  
24 **am going to be asking you specifically about**  
25 **that language and the draft in which that**

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2 language was deleted or crossed out. Are you  
3 with me?

4 A. Yes.

5 Q. Did you see the draft in which that  
6 language was crossed out?

7 MR. MORAG: Object to the form. I  
8 also object to the representation that all  
9 of the language was crossed out. If you  
10 want to show him the actual draft, it may be  
11 more appropriate.

12 A. I saw a draft which included a number  
13 of changes in which language was moved to other  
14 sections and modifications were made, and those  
15 modifications included modifications to this  
16 language. Yes, I did.

17 Q. And you refer to this as the removal  
18 of certain language in paragraph 4?

19 A. Well, I would -- without mincing  
20 words, I would say that there was a draft  
21 prepared that dealt with some of these issues in  
22 other ways, in other provisions of the  
23 agreement.

24 Q. Did you see the draft in which the  
25 language you quote in paragraph 5 was removed?

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2 A. Yes. Well, subject to the caveat as  
3 to what you mean by remove.

4 Q. What I mean by removed is the language  
5 that you quote was deleted, it was marked as  
6 deleted?

7 MR. MORAG: Object to the form.

8 Q. Did you see such a draft?

9 A. I saw a draft in which this language  
10 did not appear in this form.

11 Q. Did this language appear in any other  
12 form in that draft?

13 A. Some of it did and obviously some of  
14 it didn't.

15 Q. And what part of it did not?

16 A. I'd have to -- I would have to look at  
17 the particular draft of the agreement to answer  
18 that question. I can't recall with accurate --  
19 with accuracy what the other changes were that  
20 were made at the same time as this change was  
21 made.

22 Q. Once you saw that draft, did you  
23 personally have any discussions with anyone on  
24 the Lehman side concerning the removal of any of  
25 this language?

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2 A. As I said earlier, we prepared  
3 language, I prepared language, and that language  
4 was provided to Lehman, and they would have  
5 identified to Lehman that this language was now  
6 necessary.

7 Q. Yes. And I understand that testimony.  
8 I was just asking whether there was any other  
9 conversation that you recalled.

10 A. No, not that I was -- not that I am  
11 aware of.

12 Q. Are you aware of any discussion  
13 involving any of your partners and anyone on the  
14 Lehman side --

15 A. Actually, hang on just a second. Hang  
16 on just a second.

17 I need to see the clarification  
18 agreement in which this language appears,  
19 because this language deals with a number of  
20 issues that were in flux at the time, some of  
21 which were the subject of discussions.

22 There was language that addresses  
23 15c3-3, as I said earlier, that also addressed  
24 the DTC situation which had changed. And so --  
25 and there were conversations obviously among the

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2 parties about a number of issues that are  
3 addressed in this language.

4 But as I said, with respect  
5 specifically to the language that was added in  
6 response in section 1(a)(ii)(C), the  
7 conversation would have been in connection with  
8 the transmittal of that language to the Lehman  
9 side.

10 Q. And you don't recall any other  
11 communication with the Lehman side concerning  
12 the removal of this language beyond what you  
13 have told us?

14 MR. HUME: Object to the form.

15 MR. MORAG: Same objection.

16 A. I think the -- other than the language  
17 itself, other than the changes that were  
18 proffered by Cleary having received a revised  
19 draft and discussions that I suspect we are  
20 going to cover relating to 15c3-3, and the  
21 discussions relating to DTCC, there were no  
22 specific conversations that we had and none that  
23 we thought were necessary, because this was part  
24 of the deal.

25 Q. Did you have any discussions with  
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2 **anyone on the Lehman side concerning margin?**

3 MR. MORAG: Time frame?

4 **Q. Over the weekend prior to the closing?**

5 MR. MORAG: Objection to the form.

6 Objection to the term "margin."

7 A. Well, there were conversations --  
8 there were e-mail communications in which I was  
9 copied and Lehman's people were copied about  
10 what was going to happen to the margin at OCC.  
11 Not just the margin but the property associated  
12 with those accounts, yes, in which OCC said,  
13 consistent with the order in their -- what was  
14 then the draft TAA that they had prepared, was  
15 going to be transferred to Barclays.

16 **Q. Any discussions about margin with**  
17 **anyone on the Lehman side other than in**  
18 **connection with the OCC?**

19 MR. MORAG: Objection to the form.

20 A. There was an e-mail to me copying  
21 Lehman, I believe, about the transfer of a  
22 certain amount of margin -- I can't remember  
23 exactly what it was -- in which Lehman was  
24 copied. I think that e-mail was from Jim  
25 McDaniel. I think the trustee's representatives

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2 A. DTC and OCC.

3 **Q. Do you recall any discussion**  
4 **concerning margin at DTCC?**

5 A. Discussing margin at DTCC? Well,  
6 there were discussions about the DTC accounts  
7 and how they were going to be handled, and those  
8 accounts would have included both proprietary  
9 positions, customers' positions, positions that  
10 may have been margined, and so indirectly, all  
11 of those discussions with DTC potentially  
12 included discussions about margin, to the extent  
13 that that was relevant.

14 **Q. Any express reference to margin?**  
15 **Margin coming up in any express way in any**  
16 **conversation with DTC that you remember?**

17 A. Well, in the sense that to the extent  
18 that anything constituted margin that was in  
19 there and the discussions covered those  
20 accounts, yes. But I don't remember us  
21 specifically singling out margin as a topic.

22 **Q. Do you recall any discussions about**  
23 **margin at any foreign exchanges or**  
24 **clearinghouses?**

25 A. Again, I don't recall conversations  
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2 were also copied on that.

3 **Q. And that's in connection --**

4 **Mr. McDaniel represented the OCC?**

5 A. The OCC.

6 **Q. Yes.**

7 **Other than with respect to the OCC,**  
8 **any discussions that you had concerning margin?**

9 A. Well, verbal discussions?

10 **Q. Yes.**

11 A. I believe that there were conference  
12 calls about the clearinghouses. I think they  
13 may have been scheduled for Saturday or Sunday,  
14 and the arrangements that were going to be made  
15 and the transfers, and I believe that  
16 representatives from Lehman were on those calls.  
17 I cannot recall specifically, either the  
18 specific discussions or exactly when they  
19 occurred.

20 And it would have -- I think it  
21 probably included discussions about how things  
22 were going to be done in the transfer of margin  
23 and the like.

24 **Q. What clearinghouses are you referring**  
25 **to?**

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2 with foreign clearinghouses, but to the extent  
3 that we discussed the accounts that were going  
4 over and the credit support for them, to the  
5 extent that as part of the business that was  
6 being transferred, there were positions in those  
7 accounts, they would have been covered by the  
8 conversations.

9 **Q. And do you recall any specific such**  
10 **conversations?**

11 A. Well, there were negotiations between  
12 the parties about the business, so if you're  
13 saying that I'm taking the FCM business and if  
14 that business includes positions that are traded  
15 on foreign markets, then by definition you're  
16 talking about them as part of the same thing.  
17 If you are taking that business and customer and  
18 other deposits associated with them and assets  
19 associated with that business, then yes, you are  
20 talking about the margin indirectly, although  
21 you may not be specifically singling it out.

22 **Q. That's what I want to do. I want to**  
23 **single it out.**

24 **Do you recall a specific singling out,**  
25 **a specific mention of either margin or guarantee**

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2 fund deposit in any conversations other than in  
3 connection with the OCC?4 MR. HUME: Objection, asked and  
5 answered.6 A. I think I would say that the  
7 discussions about the assets that were being  
8 transferred in connection with the business and  
9 any deposits is a discussion about guarantee  
10 fund deposits and margin at those clearing  
11 organizations.12 Q. I understand that testimony. The  
13 question is, do you have a recollection or have  
14 you heard from any of your partners their  
15 hearing that somebody specifically referred,  
16 specifically to margin or guarantee fund deposit  
17 in any of those discussions?18 A. I think that the answer to your  
19 question is that in the documents, that is  
20 covered. And I'm confident that there may have  
21 been -- I shouldn't say that.22 I don't recall the specific  
23 conversations that we had with the clearing  
24 organizations and other lawyers who may have  
25 been involved. We may have or may not have

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2 specifically referred to the word "margin" on  
3 those calls.4 But we did repeatedly exchange  
5 communications regarding the various forms of  
6 assets that would be coming over, for example,  
7 under the TAA.8 Q. We have been talking now about the  
9 time period over the weekend prior to the  
10 closing. I would like to just ask you if I have  
11 missed anything, if we go back to the work that  
12 you were doing from the 15th on, anytime up to  
13 that weekend. During that period, do you recall  
14 any discussions specifically in which margin or  
15 guarantee fund deposit were mentioned?16 A. Again, I would say in the deal  
17 documentation relating to the transfer of assets  
18 associated with those businesses that were being  
19 transferred and the agreements as to the  
20 inclusion of deposits, including customer  
21 deposits, yes, they were the subject of  
22 communications in that form.23 Q. And what discussion do you remember in  
24 which anyone specifically referred to margin?25 A. As I say, I don't recall specifically  
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2 the content of specific conversations that I may  
3 have had at that time.4 Q. Is there any conversation that you're  
5 aware of where anyone on the Barclays or Cleary  
6 side had specifically discussed guarantee funds  
7 deposit?8 MR. MORAG: You can answer to the  
9 extent it involves someone on the Lehman or  
10 OCC or DTC side as well.11 A. It was never raised as an issue for  
12 discussion, because it was assumed by all  
13 parties, I think, that it was part of the  
14 business. And certainly nobody on the Lehman  
15 side ever suggested or raised the question as to  
16 its needing to be singled out from the language  
17 that otherwise covered it.18 Q. Now, when you saw that the draft  
19 language referring to margin and guarantee fund  
20 deposit had been removed from the draft, did  
21 that suggest to you that there needed to be a  
22 discussion about this or that someone on the  
23 Lehman side was suggesting that they had  
24 different assumptions or different  
25 understandings from what you had?

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2 MR. MORAG: Objection to form.  
3 Compound.4 A. As I mentioned, the language that came  
5 out was actually not specific to OTC -- to  
6 listed derivatives or listed derivatives  
7 customers. It was language that sort of  
8 addressed a variety of issues.9 And so I would not have drawn any  
10 necessary inference as to what specifically the  
11 concerns were that, from the Lehman side, were  
12 being addressed. There were changes to the deal  
13 that needed to be addressed in that language.  
14 There were changes in the agreements that  
15 related to the handling of -- I'm sorry. There  
16 were changes in the language that was  
17 documenting, for lack of a better reference, the  
18 15c3-3 treatment, and indeed the fact that the  
19 DTC arrangement had essentially changed.20 So it was clear that the language that  
21 was modified needed to be modified. As to  
22 whether or not that modification signaled a  
23 specific view about the treatment of credit  
24 support for exchange-traded derivatives, you  
25 would never know until you clarified it with

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2 your own language, and to my knowledge, nobody  
3 on the Lehman side, when presented with that  
4 language, expressed any surprise or objection.

5 So I think the clear inference is that  
6 it was not a surprise to them, and therefore, we  
7 inferred that there was no intent to communicate  
8 to us that they didn't think it was part of the  
9 deal, or anybody else who had the opportunity to  
10 see those changes, which would have been all the  
11 signatories.

12 **Q. So you didn't feel there was any need**  
13 **to go up and have a specific discussion with the**  
14 **folks on the Lehman side about the removal of**  
15 **the language?**

16 A. I didn't think that there was anything  
17 more that needed to be done than to provide to  
18 them the language that we thought was  
19 appropriate in order to clarify what the deal's  
20 agreement was with respect to the treatment of  
21 that credit support, that property. That is the  
22 way we ordinarily communicate in a transaction  
23 of this type.

24 **Q. In the beginning of the, of your**  
25 **paragraph 5, you note that the draft language at**

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2 **issue was an attempt to accurately document the**  
3 **business deal. Do you see that?**

4 A. Yes.

5 **Q. What is the business deal that you are**  
6 **referring to there?**

7 A. Here, that Barclays was acquiring the  
8 exchange-traded businesses, exchange-traded  
9 derivatives businesses of Lehman and the assets  
10 and customer deposits and other deposits that  
11 were part of that business.

12 **Q. Are you aware of whether there was any**  
13 **business discussion between the Barclays and**  
14 **Lehman folks concerning specifically the**  
15 **acquisition of either margin or clearing fund,**  
16 **guarantee fund deposit?**

17 MR. HUME: Objection, asked and  
18 answered.

19 MR. MORAG: Objection, form.

20 A. I don't know whether there were or  
21 weren't. I assume as part of the negotiation of  
22 the deal leading up to the description, the  
23 documentation of it, that it was implicit in  
24 those discussions.

25 **Q. You go on to say that the draft**

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2 **language accomplished this, the beginning of the**  
3 **next sentence. Do you see that, sir?**

4 A. Um-hm.

5 **Q. Can you tell me, what did the draft**  
6 **language accomplish?**

7 A. What did the -- in relation to the  
8 exchange-traded derivatives, that it -- what  
9 it -- what this -- I am sorry, let me see.

10 It included language that, as I said,  
11 covered a wide variety of things, but also would  
12 have provided -- I am sorry, included language  
13 that clarified that the property of any kind  
14 that was basically held by any of these or in  
15 any of these forms, was not an excluded asset  
16 under the terms of the deal documentation.

17 **Q. And in the quotes, you have "any and**  
18 **all property," and then you have square**  
19 **parenthesis, "including cash." Do you see that?**

20 A. Um-hm.

21 **Q. Why did you include those square**  
22 **brackets around the words "including cash"?**

23 A. Just as a clarification. It's not  
24 necessary, but just for the sake of -- for the  
25 avoidance of any lack of clarity.

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2 **Q. Why did you not include those words in**  
3 **the handwritten parenthetical that you provided?**

4 A. The answer to that question -- I'm  
5 going to try to answer this without going into  
6 attorney/client privileges, but the answer to  
7 that question is because we also came to believe  
8 that this was not the best location for  
9 clarifying this, because this got caught up in  
10 provisions dealing with, you know, what the  
11 parties understood to be an exception to the  
12 excluded assets, and excluded assets included  
13 cash. So we wanted to make sure in this  
14 provision that it was relevant.

15 But on the other hand, we realized  
16 that providing this clarification in an  
17 exclusion to the -- to an exclusion was not the  
18 clearest way to do it and, therefore, we decided  
19 in response, rather than go back into this  
20 provision and start wordsmithing, which we  
21 didn't have the time to do, we would just make  
22 it abundantly clear, in as concise words as we  
23 could, what the purchased assets included in  
24 relation to that business.

25 **Q. And you made it abundantly clear by**  
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2 **putting the parenthetical that made clear it**  
3 **included property held to secure?**

4 A. Yes.

5 **Q. And my question is, why did you not**  
6 **include, beside "property," the words "including**  
7 **cash"?**8 A. Didn't think it was necessary. At  
9 this point in time, it was 5 or 6 o'clock in the  
10 morning. We were extremely concerned about  
11 whether we were going to run out of time in  
12 terms of the objective of having this deal  
13 signed in time to be announced early in the  
14 morning, so as to avoid any negative sort of  
15 market reaction to the deal not being announced.16 And we were trying in as concise a  
17 form as possible and as clear a form as possible  
18 to get it down and not to get embroiled in  
19 parsing words.20 So I, I mean did I have -- would I  
21 have preferred to have had hours to have sat  
22 down and drafted it and perfected it? I  
23 certainly would. But I thought it was  
24 absolutely clear that if we said "any property,"  
25 that it would include cash, noncash, securities,

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2 nonsecurities, whether or not it was held by  
3 Lehman, by a clearing organization, wherever it  
4 was, and whoever was holding it and whatever its  
5 character might be.6 I think for the purpose of clarifying  
7 what might have been a subject of dispute in  
8 light of the deletion of that language, we  
9 didn't think it was actually necessary to  
10 include the language, but we were concerned  
11 about the sort of negative inferences that could  
12 arise, and so we thought because it was an  
13 important point for the deal that we would make  
14 it as clear as we could, as concisely as we  
15 could.16 **Q. You had had a discussion, and we will**  
17 **get to this a little bit later, on the subject**  
18 **of whether cash in the 15c3 account could be**  
19 **transferred to Barclays. You recall that?**

20 A. Yes.

21 **Q. And in connection with that, some of**  
22 **the Lehman people at least took the position**  
23 **that cash could not be properly transferred?**24 A. I wouldn't describe what they said as  
25 that. I would say, this was part of the purpose  
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2 of the clarification letter. There were  
3 provisions about deposits, customer deposits.  
4 There were provisions in the excluded assets  
5 provisions of the APA regarding bank accounts.  
6 And I think it was clear to us that the 15c3-3  
7 assets were assets of the business that we were  
8 buying.9 I would describe what I heard at least  
10 as being an expression of concern as to whether  
11 in light of what had been said to the court  
12 about bank deposits, whether or not if we were  
13 going to include cash in bank deposits -- that  
14 would be in bank deposits, whether some  
15 additional steps might need to be taken, which  
16 would have been inconsistent with completing the  
17 deal and being able to announce it.18 But I don't recall anybody saying that  
19 it couldn't be done or that it wasn't part of  
20 the deal or that it wouldn't be permitted or  
21 that it wasn't part of the sale order. There  
22 was, I would have said, a decision taken to  
23 avoid the issue by limiting the account assets.24 MR. HUME: We have been going for  
25 about an hour. Can we have a break?

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2 MR. MAGUIRE: Sure. If we can just  
3 wrap up this. It might take a couple of  
4 minutes.5 **Q. Were you at the sale hearing?**6 A. Only during the, for lack of a better  
7 word, the intermission. It went into recess and  
8 I was there. I was not actually there at the  
9 time that it was --10 **Q. Do you know whether the court was told**  
11 **anything about bank deposits as opposed to cash?**12 A. No, I don't know. I just know that  
13 the issue about it was raised, and under the  
14 circumstances, people were willing to eliminate  
15 the issue, rather than -- because I think the  
16 feeling was that if we didn't close before the  
17 Monday open, there may have been greater  
18 jeopardy to the deal.19 **Q. In order to avoid the issue, Barclays**  
20 **agreed that it would not take any of the cash in**  
21 **the Wells Fargo account that was part of the**  
22 **15c3 account?**

23 MR. MORAG: Objection to the form.

24 A. I would say Barclays agreed to include  
25 language in the clarification letter that only  
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2 called out the transfer of a certain amount of  
3 securities associated with the 15c3 account, or  
4 if those weren't available, other securities of  
5 similar value.

6 **Q. And did not call out the 1 billion**  
7 **dollars in cash that was at Wells Fargo?**

8 A. Not in the clarification provision,  
9 correct.

10 **Q. Now, given those discussions, and the**  
11 **decision by everyone to avoid the cash issue,**  
12 **did it occur to you that the words "including**  
13 **cash" should be included in the parenthetical**  
14 **when you described property held to secure?**

15 A. No. No, because I thought there was a  
16 clear distinction between deposits and customer  
17 deposits and LBI cash in its bank accounts.

18 MR. MAGUIRE: This is a good time for  
19 a break.

20 (Recess)

21 MR. MORAG: I should just put on the  
22 record, to the extent, Mr. Maguire, you're  
23 curious, Cleary did search for all  
24 documents, including any handwritten notes,  
25 and our production does not include them

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2 **property," did you draft that language?**

3 A. I'm sorry, could you --

4 MR. MORAG: Starting here.

5 **Q. Paragraph 5 on page 2 and starting**  
6 **with the language we have been talking about**  
7 **that starts with the quotation "any and all**  
8 **property."**

9 A. I was involved in its drafting, but I  
10 think it was, like many things, a bit of a group  
11 process.

12 **Q. So who were the members of this group?**

13 A. The members of the group on the Cleary  
14 side would have been me, Dana Fleischman, Bob  
15 Davis, Duane McLaughlin, possibly David  
16 Leinwand. Whether -- the extent to which any of  
17 one of them was specifically involved in  
18 particular language, I don't recall.

19 **Q. So this was a collective, this**  
20 **language was a collective drafting effort of a**  
21 **number of Cleary lawyers?**

22 A. Yes, although I would say probably  
23 principally me.

24 **Q. When it was proposed to the Lehman**  
25 **side, your understanding was that this language**

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2 because we were not able to find the markup  
3 that you asked about in your examination.

4 MR. MAGUIRE: I appreciate that.

5 MR. HUME: I should also state we have  
6 looked for it in the Weil production, have  
7 not found it. I'm double checking.

8 THE WITNESS: Which would have been  
9 consistent with our handing it to Weil to  
10 deal with the document.

11 BY MR. MAGUIRE:

12 **Q. Sir, before the break, we were in**  
13 **paragraph 5 of your declaration and we were**  
14 **talking about the -- what you referred to as the**  
15 **business deal in the first and second lines of**  
16 **that declaration.**

17 **Was it your understanding that the**  
18 **business deal was documented in the asset**  
19 **purchase agreement?**

20 A. It was my understanding that the deal  
21 was documented in the asset purchase agreement,  
22 the first amendment in the clarification letter.

23 **Q. The language that we have been talking**  
24 **about in the quotes at the bottom of page 2 of**  
25 **your declaration, starting with "any and all**

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2 **accurately reflected the business deal?**

3 A. Yes.

4 **Q. Did you ever ask anyone to identify**  
5 **who had negotiated this specific part of the**  
6 **business deal?**

7 MR. MORAG: Object to the form.

8 I will let you answer if it is -- as  
9 to the yes or no, but if it involves a  
10 privileged communication, do not go into the  
11 substance of the communication.

12 A. I assume it was negotiated by the  
13 principals who negotiated the deal that was  
14 ultimately documented in the APA and these  
15 documents. I was not privy to those specific  
16 negotiations.

17 **Q. Do you know the names of the**  
18 **individuals who negotiated the deal specifically**  
19 **on this point?**

20 A. I don't know who participated in each  
21 discussion. I know that Archibald Cox and  
22 Michael Klein and Jonathan Hughes and Rich Ricci  
23 were involved in the negotiations, but I did  
24 not -- I don't have personal knowledge of those  
25 exchanges.

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2 **Q. Do you know who was involved on the**  
3 **Lehman side specifically with respect to the**  
4 **business deal that's -- that you describe in --**

5 A. Whoever was in those conversations,  
6 and I wasn't present, so I couldn't identify  
7 them.

8 **Q. Did the business deal ever change?**  
9 I'm talking now specifically about that part of  
10 the business deal that's the subject of the  
11 language you and your group drafted and that you  
12 put forth in paragraph 5 of your declaration.  
13 Did that part of the business deal change  
14 anytime after the discussion of the asset  
15 purchase agreement?

16 MR. MORAG: Object to the form.

17 You can answer.

18 A. I would say that the only respect in  
19 which it changed was reflected in the 3-3  
20 provisions in which Barclays agreed in essence  
21 to relinquish the claims specifically in the  
22 clarification letter to the -- the non-769  
23 million or whatever it was of securities in the  
24 15c3-3 account.

25 There were aspects in which the deal

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2 was evolving as it contemplated it would at the  
3 sale hearing in relation to the DTC  
4 arrangements. That is all that comes to mind.

5 **Q. And specifically with respect to**  
6 **assets that were related to derivatives, margin**  
7 **or clearing funds deposit, did the deal change**  
8 **anytime after -- the business deal change at any**  
9 **time after the execution of the asset purchase**  
10 **agreement?**

11 A. I'm not aware that it ever changed.  
12 only that it was clarified.

13 **Q. You refer, at the bottom of page 2 and**  
14 **top of page 3 of your declaration, to the**  
15 **obligations of LBI or any other person. To whom**  
16 **are you referring with the words "any other**  
17 **person"?**

18 A. It could be -- well, without  
19 limitation on what it might include, the two  
20 obvious inclusions would have been the  
21 obligations of LBI or any affiliate or any  
22 customer who was involved as part of these  
23 transactions or part of the business that was  
24 being transferred.

25 **Q. Then you say, "in an account**

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2 **maintained by or on behalf of." Can you tell me**  
3 **what is the distinction here between an account**  
4 **maintained by as opposed to an account**  
5 **maintained on behalf of LBI?**

6 A. Well, Lehman, when Lehman conducts --  
7 when a broker dealer conducts business with a  
8 customer or on behalf of an affiliate or for its  
9 own proprietary account, it will reflect, it  
10 will be required to reflect on its own books and  
11 records accounts which are its accounts. Those  
12 assets may be held by custodian banks, other  
13 banks, clearing agencies, clearing  
14 organizations.

15 So this is meant to not be limited to  
16 those specific alternatives to the account as it  
17 is described on the books of the carrying  
18 broker, to carry anything, wherever it may be,  
19 if it was to secure obligations in essence for  
20 which BCI was going to become responsible.

21 **Q. And you go on to say, "for which**  
22 **Barclays shall become responsible as of the**  
23 **closing." What were you referring to there?**

24 A. At this point, I believe it was  
25 unclear how the DTCC accounts were going to be

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2 handled, but it was clear that, for example, to  
3 the extent that Barclays was a clearing, either  
4 a clearing member of a clearing organization  
5 which carried accounts, or was a clearing broker  
6 carrying positions with other clearing brokers  
7 who were clearing members of other exchanges on  
8 which positions may have been carried in or out  
9 of the United States, whatever the form, that  
10 would have been covered.

11 The point was that if there was credit  
12 support available and Barclays was on the hook  
13 and potentially subject to liabilities  
14 associated with that, that all of those assets  
15 would be available.

16 **Q. And were Barclays -- in the case of a**  
17 **foreign account, where Barclays was not**  
18 **taking -- stepping into the shoes of Lehman and**  
19 **taking over from Lehman, the obligations to a**  
20 **foreign exchange or clearing corporation, it**  
21 **would get the exchange-traded derivatives but**  
22 **not the associated assets?**

23 MR. MORAG: Object to form.

24 A. Not at all. Not at all. That's not  
25 what I am saying at all.

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2 In fact, if BCI was going to be in the  
3 chain of financial responsibility for those  
4 positions, whether it was because they were  
5 taking the account or they were carrying the  
6 account or they were carrying the account with a  
7 foreign clearinghouse or another broker who was  
8 in the clearinghouse, that that would be  
9 included.

10 **Q. And that's what I am trying to  
11 understand. Where the flip side of that  
12 happens, where Barclays was not taking the  
13 account, did you consider what happens when  
14 Barclays does not take the account at a foreign  
15 exchange?**

16 A. I think that language is dealt with  
17 elsewhere. And I need the clarification letter  
18 to --

19 **Q. So you believe there is a separate  
20 provision that deals with when Barclays takes  
21 exchange-traded derivatives --**

22 A. I don't recall the specific language.  
I would prefer to --

23 MR. MORAG: You have to --

24 A. I am sorry, I prefer to look at the  
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2 clarification letter.

3 **Q. Well, we will certainly get to the  
4 clarification letter, but your understanding is  
5 that that's not covered by this language; is  
6 that correct?**

7 A. Well, there are ellipses in here.  
8 This is a very long provision, and I'm not  
9 prepared to summarize all the things that it  
10 does or does not cover in this abbreviated form.  
11 So if you want me to tell you what it covers,  
12 you are going to have to give me the provisions  
13 so that I can look at them.

14 **Q. Sounds fair. I think it is Exhibit  
15 25.**

16 MR. MORAG: Mr. Maguire, if I recall  
17 correctly, Exhibit 25 is the executed  
18 clarification letter. You have been asking  
19 him questions about language which was not  
20 included in the executed clarification  
21 letter. So I'm not sure that's going to be  
22 responsive to his request.

23 **Q. That may be fair. Maybe we should go  
24 through the drafts.**

25 A. I think we should look at the draft  
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2 that has this --

3 MR. MORAG: Only if you have questions  
4 about the draft. If you have questions  
5 about the final, show him the final.

6 **Q. Why don't we do that. We will go  
7 through the drafts and then we will take a look  
8 at the final.**

9 **Before we do that, let me ask you to  
10 scroll down to the end of that paragraph, the  
11 bottom of paragraph 5. You refer there to,  
12 "which is consistent with the discussions of the  
13 lawyers from both sides."**

14 **Do you see that reference to those  
15 discussions?**

16 A. Um-hm.

17 **Q. Can you tell me what discussions you  
18 are referring to there?**

19 A. The discussions negotiating the terms  
20 of the deal, which were that Lehman sold the  
21 exchange-traded derivatives business and all  
22 assets associated with it and all deposits and  
23 customer deposits. But basically it is  
24 consistent with the treatment in the  
25 documentation and therefore the negotiation of

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2 the documentation relating to what it was that  
3 Barclays was getting.

4 **Q. Is there any specific conversation  
5 among any two or more lawyers that you were  
6 intending to refer to in that last sentence of  
7 paragraph 5?**

8 A. I was not present in the negotiations  
9 of the original provisions in the APA that this  
10 clarifies.

11 **Q. And you're not aware of any  
12 conversations that your partners have told you  
13 they remember from the negotiation of the  
14 original deal?**

15 **What I am trying to clarify is just,  
16 did you have in mind when you wrote this  
17 reference to discussions something either that  
18 you remembered or something that one of your  
19 partners told you about?**

20 A. No. I'm referring to what would have  
21 had to have been discussed if the parties were  
22 to come to the terms on which they signed the  
23 APA.

24 **Q. I am going to show you a document that  
25 has previously been marked as Exhibit 30. Do**

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2 you recognize this document?

3 A. Looking at the first page, no. I  
4 don't believe I was copied -- yes, I am. OK.

5 I don't recall looking at this  
6 document, but it is possible that I saw it at  
7 some point.

8 **Q. If you look, sir, at paragraph 11, you**  
9 **will see that the language there includes a**  
10 **paragraph on derivatives. Do you see that?**

11 A. Yes.

12 **Q. And there is a reference to Exhibit A.**  
13 **Did you ever see an Exhibit A?**

14 A. I don't recall whether I saw  
15 Exhibit A.

16 MR. MAGUIRE: I would ask your counsel  
17 to maybe let us know if you were able to  
18 find an Exhibit A in the Cleary production.

19 MR. MORAG: If we did, we would have  
20 produced it. I certainly have never seen  
21 it. It would not be the first time in this  
22 deal that someone anticipated an Exhibit A  
23 that was never completed.

24 **Q. Mr. Rosen, I will show you a document**  
25 **previously marked as Exhibit 36. Have you ever**  
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2 seen this draft, sir?

3 A. I can't be sure. I would have to look  
4 at it against other drafts to know.

5 **Q. If you look at the markup version.**

6 A. Is that in here?

7 MR. MORAG: At the end.

8 **Q. About halfway through.**

9 A. OK.

10 **Q. On the first page of the markup, if**  
11 **you look down at the bottom, you will see there**  
12 **is a provision that refers to a clearance box.**  
13 **Do you see that?**

14 A. Let me just look at it.

15 **Q. Sure.**

16 A. Yes, I see the provision, clause B.

17 **Q. Did you understand that Barclays was**  
18 **acquiring assets at the DTC clearance box?**

19 MR. MORAG: Object to the form.

20 A. I understood that they were acquiring  
21 all the assets of the business, including  
22 clearance box assets, some of which were at DTC  
23 and some of which were not at DTC. That was my  
24 understanding at the time. All of the assets of  
25 the business that was being acquired other than  
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2 the defined excluded assets.

3 **Q. If you turn to page 4, you will see a**  
4 **section 8. It refers to DTC arrangements.**

5 MR. MORAG: There is two section 8s.  
6 I guess you mean the second one.

7 **Q. The second one. Yes.**

8 A. Um-hm, I do see it.

9 **Q. Did you have an understanding at any**  
10 **time that Barclays was contemplating assuming**  
11 **all of Lehman's obligations to the Depository**  
12 **Trust and Clearing Corporation?**

13 A. I'm not exactly sure what you mean by  
14 contemplating, but the question as to how the  
15 DTCC situation would be handled and documented  
16 was the subject of negotiations. There were a  
17 range of potential outcomes, one of which could  
18 have included assuming those rights and  
19 obligations, but there were concerns associated  
20 with the liabilities to which they had not  
21 contemplated they would be subject based on the  
22 liabilities that were intended to be excluded  
23 but which they would become responsible for if  
24 they just simply assumed the liabilities in the  
25 accounts.

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2 So at this point in time, I don't  
3 think there was -- it was -- I don't think  
4 people were proceeding on the Barclays side  
5 necessarily on the assumption they were going to  
6 be doing this, but this was an open issue.

7 **Q. I am going to show you a document that**  
8 **has previously been marked as Exhibit 49.**

9 A. Is this blacklined --

10 **Q. Why don't we follow the blacklined.**  
11 **Do you recall seeing this document**  
12 **before?**

13 A. It looks like a draft I may have seen.  
14 Again, without, you know, comparing them, I  
15 can't be sure.

16 **Q. Was that a protocol that Cleary**  
17 **followed at the top of the blackline, where it**  
18 **says "CGSH comments" and the date and time?**

19 MR. HUME: Object to the form.

20 MR. MORAG: Same objection.

21 A. I don't know that it is a practice  
22 that's uniformly followed, but when there is  
23 enough time and the comments are transmitted in  
24 this way, you might do it just because there  
25 could otherwise be confusion about the timing of

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2 drafts and what followed what.

3 But it would not have been the  
 4 protocol, for example, in circumstances where,  
 5 as happened frequently in this deal, comments  
 6 were just scribbled on a piece of paper and sort  
 7 of shared and then ultimately inputted.

8 **Q. Do you see at the bottom of the first**  
 9 **page, there is a reference to certain assets and**  
 10 **the clearance box language has been removed? Do**  
 11 **you see that?**

12 MR. HUME: Object to the  
 13 characterization of the document.

14 MR. MORAG: There is no question  
 15 pending other than to refer your attention  
 16 to the first page.

17 A. I'm just trying to understand the  
 18 entire document. OK. Yes.

19 **Q. At the bottom where the clearance box**  
 20 **language was on the bottom of page 1, do you see**  
 21 **that?**

22 A. Yes, I do.

23 **Q. You will see that Cleary has added the**  
 24 **language, "or any portion of such securities."**  
 25 **See that, the last two lines on the page?**

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2 A. Um-hm, yes, I do.

3 **Q. Just from your previous testimony, I**  
 4 **understood your understanding was that Barclays**  
 5 **was acquiring all of the assets at DTC. So can**  
 6 **you explain to me why Barclays wanted to**  
 7 **negotiate the right to acquire only a portion**  
 8 **instead of all of the assets?**

9 MR. MORAG: Object to the form, and  
 10 objection, mischaracterizes his testimony.

11 A. I didn't say that they were buying all  
 12 the assets at DTCC. I said they were acquiring  
 13 the assets of the business.

14 And in terms of this, it looks to me  
 15 as though the portion of this, the change that  
 16 was made here, was that to the extent there was  
 17 any discretion not to take them, that discretion  
 18 enabled them to decide when they were going to  
 19 take all or just a portion of them. It wasn't  
 20 an all or nothing decision.

21 I think there was not -- it was not  
 22 entirely clear -- I'll just leave it at that.

23 **Q. And can you tell me why it was**  
 24 **important to have the ability to take a portion**  
 25 **of the assets, instead of all of the assets?**

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2 MR. HUME: I am going to object to the  
 3 lack of foundation and to the extent it  
 4 calls for speculation.

5 MR. MORAG: Same objection.

6 A. I wasn't directly involved in this,  
 7 but my recollection is that this provision  
 8 relating to the ability not to take some  
 9 clearance box assets, I'm not sure that we were  
 10 the source of that, but I think this provision  
 11 merely provided more flexibility that to the  
 12 extent that there was discretion to take or not,  
 13 that was a discretion to take or not in whole or  
 14 in part.

15 **Q. And were you privy to any of the**  
 16 **discussions about why it was important to have**  
 17 **that flexibility?**

18 A. I was not privy to those discussions,  
 19 and I don't know whether there were discussions  
 20 or whether it was a provision that was suggested  
 21 by the other side, or whether we really cared  
 22 about it, given that it provided a flexibility  
 23 that we didn't have any obligation to, that  
 24 Barclays didn't have any obligation to exercise  
 25 or not.

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2 **Q. If you turn to the top of the next**  
 3 **page, you will see item C on the second line**  
 4 **refers to exchange-traded futures. Do you know**  
 5 **why the reference here is to exchange-traded**  
 6 **futures?**

7 A. This was, I think -- this was a  
 8 placeholder. I think the purpose of putting  
 9 this in brackets was that people wanted to put a  
 10 marker down that they needed to consider whether  
 11 anything needed to be addressed to those issues,  
 12 and if so, what, and people didn't know exactly  
 13 what it would have been appropriate to have  
 14 included here or whether it was necessary to  
 15 include anything, but so as not to drop the  
 16 issue, I think the bracketed language was  
 17 included, and I don't think there was any  
 18 particular attention paid to exactly how those  
 19 issues were put on the table.

20 **Q. And then if you look down at item D,**  
 21 **you will see the exception, exclusion from the**  
 22 **exclusion.**

23 A. Right. I see that.

24 **Q. And this includes the language that**  
 25 **you referred to in your declaration?**

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2 A. It seems to. Again, I can't be sure  
3 that all of these words are exactly the same  
4 without verifying, but it looks like the  
5 provision that was just described.

6 **Q. If you turn to the next page, page 4,  
7 and the section 8, do you see the same language  
8 appearing in that section?**

9 MR. MORAG: As what?

10 MR. MAGUIRE: As well.

11 MR. MORAG: No. As what? Same as  
12 what?

13 **Q. Same as the language that you quote in  
14 paragraph 5 of your declaration.**

15 A. I see some similar wording. I don't  
16 think it is exactly the same.

17 **Q. If we turn back to page 2, to that  
18 section D, as in David.**

19 MR. HUME: Section 2? Page 2.

20 **Q. At the beginning of D, it specifically  
21 says that "excluded assets shall not include any  
22 and all property of any customer." Do you see  
23 that?**

24 A. I see that it says "except as  
25 otherwise specified in the definition of

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2 purchased assets, excluded assets shall not..."

3 **Q. And what was the point of this  
4 reference to customer property?**

5 A. The purpose of this language was to  
6 insure that to the extent that -- what do you  
7 call it -- to insure that to the extent that, in  
8 connection with any account that was  
9 transferred, there were liabilities associated  
10 with them at the property that secured those  
11 obligations and protected those liabilities,  
12 were included in the deal, not excluded by any  
13 other provision.

14 **Q. And you're talking about all the  
15 customer accounts that were transferred from  
16 Lehman to Barclays?**

17 A. Yes, this refers to customers whose  
18 accounts were being transferred.

19 **Q. You see a little further down, there  
20 is a reference to 15c3-3?**

21 A. By the way, it says "or."

22 **Q. Right.**

23 A. "Maintained by or on behalf of," "for  
24 which they become responsible," parsing down.

25 So whether or not the account was

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2 being transferred, if somehow Lehman -- Barclays  
3 was to assume responsibility for that, that  
4 would also be included. It didn't have to  
5 necessarily be a transferred account.

6 **Q. So you're saying it either had to be a  
7 transferred account or an account for which  
8 Barclays became responsible?**

9 A. You know, I hate to say this, but this  
10 sentence is incomplete. I see that it says  
11 maintained, A, and then I don't see a clause B.  
12 So it is not impossible that there was other  
13 language that should have been included here  
14 that wasn't.

15 But in terms of the language that's in  
16 here, I think the concept was, if we were taking  
17 accounts or would otherwise become responsible  
18 for them, that they would be ours, and if they  
19 were otherwise purchased assets, they would be  
20 ours. Any of those three categories would have  
21 been encompassed.

22 **Q. And the 15c3 account is mentioned here  
23 too, right?**

24 A. Yes.

25 **Q. And you understood that the entire**

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2 **15c3 account was being transferred to Barclays;  
3 is that correct?**

4 MR. MORAG: Objection, time frame.

5 **Q. The time frame was as of this draft.**

6 A. That is what this draft seems to  
7 provide.

8 **Q. Now, we discussed earlier about how  
9 Barclays was getting the assets associated with  
10 the accounts when it was becoming responsible  
11 for the accounts, and I had asked you about  
12 foreign exchanges where Barclays was not taking  
13 over the accounts, it was not stepping into the  
14 shoes of Lehman, and the question I asked you  
15 then, and I would like to re-pose to you now --**

16 A. I would like to just stop you and say,  
17 I'm not aware of Lehman not -- of there being a  
18 distinction in the context of the  
19 exchange-traded derivatives between, you know,  
20 U.S. listed derivatives and non-U.S. listed  
21 derivatives. So you can postulate that, but I'm  
22 not necessarily agreeing that that's the right  
23 characterization.

24 **Q. I'm not characterizing derivatives  
25 differently. I'm talking about where -- I'm**

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2 asking you to focus on the distinction between  
3 the accounts that Barclays was assuming and  
4 becoming responsible for and the accounts that  
5 Barclays was not assuming and not becoming  
6 responsible for. And you told me about the  
7 first. Now I want to ask you about the second.

8 With respect to those accounts, and  
9 the example I will give you is the foreign  
10 accounts, when Barclays was acquiring  
11 exchange-traded derivatives in foreign  
12 organizations around the world and was not  
13 stepping into the shoes of the foreign -- of  
14 Lehman in those foreign clearing organizations,  
15 what was your understanding as to how margin  
16 clearing fund deposit was being treated under  
17 the business deal?

18 MR. HUME: I object to the question as  
19 lacking foundation, particularly in light of  
20 the witness' testimony that he is not aware  
21 of any such accounts. Therefore, I object  
22 that it calls for speculation and a  
23 hypothetical, and he is not here as an  
24 expert.

25 A. Well, if there was a guarantee fund  
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2 to whether the language provided for that or  
3 not.  
4 Q. I don't want any advice, sir. What I  
5 am looking for is to follow up on your earlier  
6 testimony where you said you needed to see the  
7 draft, and specifically what I had asked you was  
8 to see where Barclays was not taking the  
9 account, Barclays did not take the account at a  
10 foreign exchange. And I believe you answered  
11 that that language is dealt with elsewhere and  
12 you needed the clarification letter to point  
13 that out.

14 Can you point out in this draft of the  
15 clarification letter anything that you  
16 understood at the time covered the situation  
17 where Barclays was not acquiring the account?

18 MR. HUME: Objection, lacks  
19 foundation. I don't think you have  
20 established when Barclays didn't acquire the  
21 account or what that means.

22 MR. MAGUIRE: I'm just asking the  
23 witness to identify what he was referring to  
24 in his prior testimony.

25 A. You are asking -- I am sorry, can you  
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2 deposit, and it was a Lehman guarantee fund  
3 deposit, you would have to parse that under the  
4 agreement. But there are -- the fact that  
5 Lehman may not have been a clearing member of  
6 the foreign clearinghouse directly and had  
7 contributed to the guarantee fund deposit does  
8 not mean that was not an account for which  
9 Barclays would have become responsible, as I  
10 said, if Barclays was in any part of the chain  
11 between customer and the clearinghouse.

12 So, it may not have been Barclays -- a  
13 transfer of an account, but if Lehman maintained  
14 the account and carried the account with  
15 Barclays who carried it with somebody else, that  
16 would have been a different matter. And if it  
17 was part of the assets that were purchased, if  
18 it were part of the assets that were purchased,  
19 then whether or not the account was transferred  
20 or whether or not it was an account for which  
21 Barclays became responsible, if it was something  
22 that they acquired as part of Lehman's business,  
23 exchange listed derivatives business, then it  
24 would be included.

25 I guess I am not here to advise you as  
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2 ask specifically the question --

3 Q. Sure.

4 A. -- that you are asking me to respond  
5 to.

6 Q. What I am focusing on is the limiting  
7 words -- I won't give it a characterization,  
8 I'll say the words, that are in the language  
9 drafted here by you and your Cleary colleagues,  
10 where you -- where the language we have been  
11 discussing is specific to accounts for which  
12 purchaser shall become responsible as of the  
13 closing.

14 I'm asking you what -- where in this  
15 document did it deal with those accounts for  
16 which Barclays did not become responsible at the  
17 closing?

18 MR. MORAG: Objection to the form, and I  
19 think you have mischaracterized his  
20 testimony. I'm not sure he said it was  
21 reflected in this draft.

22 A. Well, as I said, this exception is  
23 itself limited to the extent that it was a  
24 purchased asset of a business. This language  
25 does not call out and specifically address --

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2 this particular provision doesn't specifically  
3 address it, and how it would be treated would be  
4 a function of how you evaluate the scope of the  
5 purchased assets which were all the assets  
6 associated with the business.

7 So you would still have to evaluate  
8 it, not under this language but under the  
9 purchased asset provisions. Obviously I can't  
10 go further into how you would evaluate those  
11 provisions.

12 **Q. I'm not asking you to form an opinion  
13 here, just so we are clear. I am only asking  
14 you for your understanding at the time. And --**

15 A. As I said, I'm not -- there seems to  
16 be a clause B that's not here, and so I'm not  
17 entirely comfortable sitting here reflecting on  
18 all of the things that I was thinking about at  
19 the time that I drafted.

20 But I will -- but I agree that the  
21 language here as it relates to customer  
22 accounts, are accounts that are transferred or  
23 accounts for which BCI is becoming responsible  
24 in some way.

25 **Q. And you had referred earlier in your**

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2 **testimony to where that situation was covered by  
3 language elsewhere. Was there some other  
4 language --**

5 A. I am sorry, I am sorry. Or if it was  
6 a cash item maintained by LBI pursuant to  
7 15c3-3.

8 So if there was -- so it wouldn't have  
9 been customer property, it would have been  
10 property, technically property of Lehman  
11 Brothers, Inc. But to the extent that it  
12 relates, the reserve relates to a customer  
13 account, that does not seem to be so limited  
14 here.

15 But I don't think you need me to parse  
16 the language in this provision.

17 **Q. No. What I am looking for, sir, is,  
18 when you referred to language elsewhere covering  
19 this specific point where Barclays was not  
20 acquiring the accounts, what language did you  
21 have in mind?**

22 A. Purchased assets.

23 **Q. Section 1 --**

24 A. Purchased assets provisions.

25 **Q. Section 1 of the clarification letter?**

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2 A. The answer to your question is, all of  
3 the other provisions of the documentation that  
4 establish the rights and obligations of the  
5 parties.

6 **Q. Is there anything specific you can  
7 point me to?**

8 A. The provisions that relate to  
9 purchased assets.

10 **Q. Is that generally section 1 of the  
11 clarification letter, or is there anything --**

12 A. It is in the APA, and it's in the  
13 clarification letter.

14 **Q. Is there any more specificity you can  
15 provide me?**

16 A. I think I am going to leave that  
17 parsing to you.

18 **Q. If you turn to page 4, section 8, the  
19 new section 8 that starts with DTC arrangements  
20 and some language, that language and other  
21 language removed. Do you see that?**

22 A. Yes.

23 **Q. Can you tell me what prompted the  
24 removal of the language concerning the DTC  
25 arrangements?**

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2 A. I don't think it was removal of that  
3 language so much as a belief by the drafters  
4 that these provisions needed to cover a broader  
5 set of -- category of arrangements than just  
6 DTCC. Because, for example, there was the OCC  
7 arrangement and possibly other clearinghouses of  
8 which Lehman might have been a member that might  
9 have been coming over.

10 **Q. This section continues in the next  
11 sentence, "Assumption of accounts: Purchaser  
12 shall assume all customer accounts of the  
13 business." Do you see that?**

14 A. I do.

15 **Q. And do you understand that the text  
16 that follows all describes transfers of property  
17 to Barclays in connection with the transfer of  
18 customer accounts?**

19 MR. HUME: Objection to the form.

20 A. First let me just clarify that it says  
21 all accounts of the business, not necessarily  
22 all accounts.

23 MR. MORAG: I am going to object --

24 A. I think to answer your question, I am  
25 going to have to evaluate how you interpret the

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2 interplay of various provisions here. I'm not  
3 sure I can answer that without effectively  
4 analyzing the contract and interpreting it.

5 **Q. Did you understand that Barclays was  
6 assuming all of the customer accounts of the  
7 business?**

8 MR. HUME: Objection to the form.

9 MR. MORAG: Again, the time frame?

10 **Q. At the time of this draft.**

11 A. I -- it was very fluid. I can't  
12 recall when I understood what precisely was in  
13 and what was out. I knew that there were some  
14 things that were in and some things that were  
15 out, but I'm not sure at this time what my state  
16 of knowledge was.

17 I was also not the draftsperson of  
18 this or the draftsperson to use language that  
19 was common to the provision.

20 **Q. Did you come to understand at some  
21 point that certain of the customer accounts of  
22 the business were not being assumed by Barclays?**

23 A. Yes. Yes, I understood that there was  
24 the sale of something called PAM that was being  
25 sold to Neuberger Berman. I can't remember when

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2 I became aware of that.  
3 And I believe that there was -- there  
4 were certain exceptions to the PIM accounts, or  
5 maybe it was some other business, but I  
6 didn't -- as I say, I am not -- I was not and am  
7 not familiar with how the business was  
8 organized, but there were some that were in and  
9 there were some that were not.

10 **Q. I will show you a document previously  
11 marked as Exhibit 616A. Obviously I'm not going  
12 to ask you about the first page, which is an  
13 e-mail that you weren't copied on, but I will  
14 ask you, sir, if the rest of the document is a  
15 draft that you were aware of at the time.**

16 A. I'm not sure that I can -- I can't  
17 read this. I can't read out the provisions, and  
18 I don't know what time this document was  
19 generated or when it was shared with anyone on  
20 our side sitting here. I don't know. This may  
21 have been an internal draft. I'm not sure I  
22 recall seeing it contemporaneously.

23 **Q. The only reason I wanted to show it to  
24 you is really on page 2 at the bottom, if you  
25 can make out through the highlighting, you will**

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2 see language concerning margin and guarantee  
3 funds deposit, the language that you address in  
4 your declaration.

5 A. I cannot actually see it on this copy  
6 unfortunately.

7 **Q. OK. I'll represent to you that this  
8 draft removes that language. I think in your  
9 declaration, you refer to a draft --**

10 MR. HUME: Are you representing it is  
11 removed or removed and replaced with  
12 something else?

13 MR. MAGUIRE: I can read it on my  
14 copy.

15 MR. HUME: I understand. But you are  
16 representing that it is removed. Are you  
17 representing that anything was added?

18 MR. MAGUIRE: I am certainly not  
19 representing that.

20 MR. HUME: There is language added  
21 right after the removal.

22 MR. MORAG: If I may state for the  
23 record, in terms of the declaration, the  
24 fact of the non-inclusion of the language of  
25 paragraph 5 was established by a draft, a

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2 subsequent draft, but not necessarily this  
3 one.

4 MR. MAGUIRE: You're right, actually,  
5 and we will show that to the witness next.  
6 It is Exhibit 50.

7 **Q. In broad terms, you were aware that  
8 the language we have been discussing from  
9 your -- that you quote in your declaration was  
10 removed, but do you have a recollection of  
11 actually seeing the draft that had that removal  
12 in it, that showed the actual deletion of that  
13 language?**

14 A. I would have seen a draft which  
15 modified the language that we had included, as I  
16 described earlier. Whether I saw it in a  
17 blackline or a clean copy, I can't remember.

18 **Q. Did you ask any of your partners about  
19 that question, whether they saw it with the  
20 language actually deleted --**

21 A. I didn't ask my partners or I don't  
22 recall asking my partners that question.

23 **Q. Let me show you a document previously  
24 marked as Exhibit 50. Take whatever time you  
25 need to review the draft, sir, and just let me**

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2 know when you're ready.

3 And my first question is going to be,  
 4 have you seen this draft before?

5 A. I've seen before an e-mail transmittal  
 6 from Michael Mazzuchi passing on a draft of the  
 7 clarification letter to DTCC and its counsel at  
 8 their request, and there being a draft of the  
 9 clarification letter attached to it that was  
 10 provided to us by Weil.

11 But as to whether this is exactly the  
 12 same draft, I can't say. I would have to  
 13 verify.

14 Q. You will see at the bottom of page 1  
 15 of the draft is a reference to LBI's clearance  
 16 boxes.

17 A. I see that.

18 Q. Do you know why the word DTC was not  
 19 included there?

20 A. My understanding is that it was not  
 21 included because there were clearance box assets  
 22 held at locations other than DTCC. So DTCC was  
 23 not the exclusive depository of clearance boxes,  
 24 is my recollection.

25 Q. And what were the other depositories?

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2 A. I don't remember knowing the details.

3 Q. Did anyone consider saying DTC and  
 4 other clearance boxes?

5 MR. MORAG: Object to the form.

6 A. I wouldn't speculate as to whether  
 7 somebody did or didn't. They may have.

8 Q. In a prior draft, there had been a  
 9 reference to the box 074, which I understand was  
 10 the DTC box. Do you have any knowledge as to  
 11 why that reference was dropped?

12 A. I am not certain, but I have a  
 13 recollection that it was because 074 may not  
 14 have included all of the clearance box assets,  
 15 that they may not have been confined to the  
 16 account 074. But I'm not 100 percent certain.  
 17 I have a recollection of something along those  
 18 lines.

19 Q. If you look at the bottom of page 1,  
 20 you will see there is a parenthetical that says,  
 21 "provided, however, that purchaser in its  
 22 discretion may elect within 60 days after the  
 23 closing to return any such securities to LBI."

24 Do you see that?

25 A. Yeah.

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2 Q. And can you tell me what was the  
 3 purpose of that?

4 A. I'm not sure that we were the source  
 5 of that language. I think that on its face, it  
 6 seemed to have contemplated that there may be  
 7 things that, in the clearance box, that Barclays  
 8 might not have wanted.

9 Q. And do you have any understanding as  
 10 to what kinds of assets Barclays would not want  
 11 from the clearance box?

12 MR. HUME: Objection, calls for  
 13 speculation.

14 A. As I say, I'm not sure that this was  
 15 motivated by Barclays, and I'm not sure that  
 16 this wasn't an option that was being provided to  
 17 Barclays that Barclays didn't see any reason to  
 18 negotiate, since it gave them the ability to do  
 19 something but not an obligation to do it.

20 Q. But you don't have knowledge as to  
 21 what prompted this?

22 A. No, I don't. Or I should say I don't  
 23 recall.

24 Q. If you turn to page 4, and see the  
 25 paragraph 8, transfer of customer accounts. And

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2 towards the end of that, you will see a  
 3 reference to 15c3.

4 A. Yes.

5 Q. And at the end of that sentence, it  
 6 refers to the phrase, "or securities of  
 7 substantially the same nature and value."

8 A. Yes.

9 Q. Can you tell me how did those words  
 10 get to be inserted in the clarification letter?

11 MR. MORAG: Which words? All of them?

12 Q. The words "or securities of  
 13 substantially the same nature and value."

14 A. My recollection of the events for  
 15 that, following on the discussion which led to  
 16 the limiting of this provision to 769 million of  
 17 securities, that Harvey Miller raised the  
 18 question whether or not it was clear that we  
 19 could agree to this.

20 And I told him that I was not aware of  
 21 a limitation, particularly to the extent as had  
 22 been represented, that the 769 million dollars  
 23 was excess to the level that Lehman was required  
 24 to reserve under 3-3 as of that date, and in  
 25 response to the question can we do it, I

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2 suggested that if there was a concern along  
3 those lines, which we didn't share -- and I'll  
4 say only, my recollection is there was a  
5 question raised about it -- that we say to the  
6 extent permitted by applicable law and as soon  
7 as practicable after the closing.

8 And because the provision by its terms  
9 then raised a question about whether or not this  
10 value was going to be conveyed, because the  
11 reason this was in here and was the subject of  
12 discussion was that there was a significant  
13 erosion or concern about the erosion of value  
14 and assets that were contemplated to be  
15 delivered initially but were not available to be  
16 delivered, and that Lehman identified this as a  
17 source of value, and so we wanted to make sure  
18 that that value was conveyed.

19 And so as a result of this language,  
20 it made us think, well, fine, if you can't give  
21 us these 769 million of securities, give us  
22 those other securities of a similar nature and  
23 value.

24 That's my recollection of the origins  
25 of this provision.

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2 **Q. I'll show you a document we have**  
3 **previously marked as Exhibit 451. Have you seen**  
4 **that before, sir?**

5 A. I don't recall that I necessarily saw  
6 precisely this. I do recall that there was a  
7 representation made that the SEC had approved as  
8 excess a certain level of value and that there  
9 was an e-mail. We thought that we were going to  
10 see an e-mail saying that. Instead, there was  
11 an e-mail, I recall, but which didn't involve --  
12 didn't come from the SEC, but reported that it  
13 was approved.

14 I don't think I have seen this  
15 particular document, and I can't say that I  
16 recall with precision the numbers for the  
17 allocations between cash and securities.

18 **Q. Did you ever discuss Lehman's 15c3**  
19 **account with Mike Macchiaroli?**

20 A. I don't recall being able -- at the  
21 time that I sort of first saw this, which I  
22 believe was on a -- or not this -- I was made  
23 aware of the e-mail and shown something. I do  
24 not believe that I spoke to Mike Macchiaroli,  
25 but as I mentioned at the outset of this, I had

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2 earlier had a conversations with Mike which,  
3 while we didn't discuss specifically the 3-3  
4 reserve account or the amount that was excess, I  
5 came away with the impression that he was  
6 optimistic that there was going to be sufficient  
7 assets.

8 So I did not have a -- I did not have  
9 a -- I did not have a confirmation from him. I  
10 didn't have a concern that there would be a  
11 deficiency, but I did not have an opportunity to  
12 actually go over this with him.

13 **Q. So in your earlier conversation with**  
14 **Mr. Macchiaroli, he was optimistic that there**  
15 **would be sufficient assets available to pay all**  
16 **customer claims; is that correct?**

17 A. Yeah. That -- well, I don't think he  
18 would have -- I don't think he would have -- I  
19 don't mean to put words in his mouth that he  
20 would have made a representation to those  
21 effects, but I came away with an impression that  
22 he was optimistic that there wouldn't be a  
23 shortfall.

24 **Q. And you took from that conversation**  
25 **that there wouldn't be a shortfall in customer**

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2 **property?**

3 A. Yes.

4 **Q. And you, therefore, expected --**

5 A. Well, I took away that at that point,  
6 knowing what he knew, that it looked as though  
7 there wouldn't be. I wouldn't say -- I wouldn't  
8 characterize it beyond that.

9 **Q. And he didn't tell you to what extent**  
10 **there would be any excess?**

11 A. We didn't discuss any quantification.

12 **Q. Did you have any discussions with**  
13 **anyone at the SEC concerning the reserve account**  
14 **or any excess in the reserve account?**

15 MR. MORAG: Objection, asked and  
16 answered.

17 A. I don't recall.

18 **Q. Now, you were responding to a Weil**  
19 **question. Was it Harvey Miller who said can we**  
20 **do it?**

21 A. I believe it was Harvey Miller, yes.

22 **Q. What he was referring to is the**  
23 **transfer from the 3-3 account?**

24 A. Yes. He was, he was raising the  
25 question as to whether there might be a

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2 limitation on this transfer.

3 **Q. And did you understand that there was**  
4 **1.7 billion in the reserve account?**5 A. I don't think I recall at that time  
6 specifically what the number was. I knew that  
7 there was a reserve account, and I knew it was  
8 funded. I can't recall at what level it was  
9 funded.10 **Q. And there was -- one issue was this**  
11 **cash issue that you testified about earlier,**  
12 **right? And that was resolved by people avoiding**  
13 **the issue and simply not transferring the cash**  
14 **to Barclays, correct?**

15 A. Correct.

16 **Q. And that left the 700 or 769 million**  
17 **which was government securities?**

18 A. They were securities, yes.

19 **Q. And with respect to that, Mr. Miller**  
20 **raised the question can we do it, meaning can we**  
21 **transfer this 769 million from the reserve**  
22 **account to Barclays?**

23 A. Correct.

24 **Q. And you said that there was no limit**  
25 **to the extent to which that could be transferred**

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2 **where there was an excess in the account?**3 MR. MORAG: Objection to  
4 mischaracterizing. I think he said  
5 limitation.6 A. What I said was I wasn't aware of a  
7 limitation that would prevent them as part of  
8 this transaction from effecting that transfer,  
9 and I said particularly if it is an excess. I  
10 didn't limit it to it being an excess.11 **Q. Where there was no excess, where there**  
12 **was in fact a deficiency or shortfall in**  
13 **customer property, were you aware of any**  
14 **limitation on the ability of Lehman to transfer**  
15 **from the reserve account to Barclays?**16 A. There is not a limitation identified  
17 to me that couldn't necessarily be addressed as  
18 part of the transaction. They could -- there is  
19 no -- the sale of a business where the customer  
20 accounts or some portion of them are going over,  
21 I'm not aware of a reason why the SEC and the  
22 court couldn't assent to the transfer of those  
23 assets if it wanted to.24 And one would have inferred from the  
25 documents that as part of the assets of the  
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2 business that was being sold, that that had in  
3 fact been approved in a transaction approved by  
4 the court and to which the SEC gave no  
5 objection.6 **Q. And that would have involved then**  
7 **transferring -- where there was a shortfall or**  
8 **deficiency, the transfer of 769 million would**  
9 **have to come from customer property; isn't that**  
10 **correct?**

11 MR. MORAG: Object to the form.

12 A. Not necessarily.

13 **Q. Well, the transfer of that amount to**  
14 **Barclays would mean that 769 million would not**  
15 **be available to satisfy customer claims?**16 A. That's not -- whether or not Lehman  
17 would have been under-reserved going forward,  
18 when it was in liquidation mode, is an entirely  
19 different question that would not necessarily --  
20 if these assets were in the account but this  
21 account was required to have more, those assets  
22 would still be assets of Lehman, that as part of  
23 this transaction could have been approved to be  
24 transferred to Barclays as part of the business  
25 that it was acquiring.

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2 **Q. And it was your view that could have**  
3 **been done regardless of whether that left**  
4 **customers, remaining customers short by the**  
5 **amount of 769 million?**6 A. That's not what I said. I said that  
7 could be done even if as a result Lehman had a  
8 deficit in its reserve account.9 **Q. I know that's what you said. But my**  
10 **question is, where there is such a deficit and**  
11 **the transfer of these assets means that the**  
12 **customers do not have access to that**  
13 **769 million, and that means that --**14 A. You know, those assets may have had --  
15 as the deal was approved, it was represented  
16 that there were other assets that Lehman had.  
17 The assets that can be made -- as I'm sure you  
18 are aware, the assets that can be made available  
19 to customers in satisfaction of their claims are  
20 not limited to what is in the 15c3-3 account.  
21 That is a regulatory construct that does not  
22 limit the recourse of customers.23 So I reject the premise that the  
24 transfer of that would necessarily have resulted  
25 in a shortfall.

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2 **Q. And leaving aside the whole construct**  
3 **and whole premise, my only question is, you were**  
4 **not aware of any limitation, even in the**  
5 **event --**

6 A. I wasn't, I wasn't thinking about all  
7 of the -- parsing all of the scenarios. There  
8 was nothing on the face of this agreement that  
9 to my mind couldn't be accomplished, and from my  
10 perspective, caveating it with the language "the  
11 extent permitted by applicable law," even though  
12 you could argue that that's implicit, was a  
13 concession that we could readily make in order  
14 to complete the deal.

15 **Q. So given that concession, you didn't**  
16 **think through what would happen if the transfer**  
17 **left unavailable property for customers?**

18 MR. MORAG: Object to the form.

19 A. No, I reject that characterization.  
20 It was not necessarily the case that there would  
21 have been any deficit for customers as a result.  
22 And as a result, because I didn't have the  
23 information available to evaluate it, I did not  
24 engage in a hypothetical conjecture as to  
25 whether -- under what circumstances or set of

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2 facts there would be a problem.

3 But from my perspective, but for the  
4 concern, which was really a procedural concern  
5 as a matter of caution, as I understood it from  
6 Harvey Miller, I believed that these assets  
7 arguably were intended to be transferred, were  
8 intended to be transferred as part of the assets  
9 of the business.

10 **Q. In any event, you and the Barclays**  
11 **side of the house agreed to set aside the cash**  
12 **issue by taking the billion dollars in cash out**  
13 **of the deal, correct?**

14 A. By taking the billion dollars out of  
15 the deal?

16 **Q. Yeah. The 1 billion dollars in the**  
17 **bank account was not being transferred as part**  
18 **of the reserve account?**

19 A. Let me say this. This provision, this  
20 provision doesn't call for the transfer of that.  
21 I will leave it to the lawyers to argue what the  
22 implications of that might be.

23 **Q. And as to the remaining issue as**  
24 **raised by Mr. Miller about can we do it with**  
25 **respect to the government securities, somebody**

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2 **proposed that that issue would be resolved by**  
3 **inserting the words "to the extent permissible**  
4 **by law"?**

5 A. My recollection is that that was me.

6 **Q. Now, did all this happen in a hallway**  
7 **conversation?**

8 A. Yes.

9 **Q. Who was present?**

10 A. I don't have a clear recollection  
11 other than Harvey Miller was there, Vic Lewkow  
12 was there. I think Dana Fleischman may have  
13 been there at least for some portion of it. And  
14 there were others huddling around, but I don't  
15 have a clear recollection, and to be perfectly  
16 candid, because I wasn't involved in the  
17 negotiation of this transaction from the very  
18 beginning, I was not as -- and I was mostly  
19 troubleshooting specific issues, particularly  
20 those relating to the clearing arrangements, I  
21 was not as familiar with the lawyers from the  
22 other side, so I could not have readily, as  
23 readily identified them.

24 **Q. How long did the, did this hallway**  
25 **huddling session last?**

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2 A. I honestly don't know. More than a  
3 couple of minutes, less than a couple of hours.

4 **Q. And can you tell me what you recall**  
5 **being said in the course of this hallway**  
6 **conversation?**

7 A. Pretty much what I have just described  
8 to you, that there was a group already there  
9 when I arrived. I guess some predecessor  
10 language to this was being reviewed, and Harvey  
11 Miller, as I said, raised the question whether  
12 there might be limits under applicable law, and  
13 I said that I wasn't aware of any, but to the  
14 extent that they exist, and it would address  
15 your concern, we can provide that the transfer  
16 be to the extent permitted by applicable law.  
17 But if there was such a constraint, that that  
18 basically 769 million dollars in securities  
19 would come from somewhere else.

20 And can I remember exactly what was  
21 said, whether it was a grunt or a nod or a  
22 smile, I don't remember, but I remember coming  
23 away from the conversation feeling that we had  
24 sort of resolved the point.

25 **Q. Who was the person who gave the --**  
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2 manifested assent with the grunt or nod or  
3 smile?4 A. I could be wrong, my recollection was  
5 that it was Harvey Miller, but I could be wrong.6 Q. Did Mr. Miller agree to your proposal  
7 that "to the extent permitted by applicable law"  
8 would be inserted into the --

9 A. That was my understanding, yes.

10 Q. Did he also agree to avoid the cash  
11 issue by having this provision not call for the  
12 transfer of a billion dollars in cash?

13 A. I believe he did.

14 Q. And did that also happen in this  
15 hallway conversation?16 A. It may have been two different  
17 conversations or it may have been a continuing  
18 conversation. Again, I was called out to deal  
19 with other issues constantly, issues that were  
20 being dealt with in different rooms and on  
21 different floors, so I don't have a clear  
22 recollection of precisely what the progress, the  
23 progression of discussions were.24 The cash conversation clearly preceded  
25 this. And there may have been a break before

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2 this issue, it may have been that drafts were  
3 prepared and exchanged to reflect the first  
4 issue, and then the second issue was raised. I  
5 just don't have a clear recollection of it.6 Q. We seem to have the cash issue, you  
7 say maybe came up first, and then we have a  
8 second issue is, can we do it, as in  
9 transferring the 769, and that gets resolved  
10 with your proposed language "to the extent  
11 permissible by applicable law," right?12 MR. HUME: Objection, mischaracterizes  
13 his testimony.

14 A. Do you want to repeat the question?

15 Q. If the first issue is the cash issue,  
16 the second issue is the can we do it question  
17 that Mr. Miller raised?18 A. Transfer, there was a discussion about  
19 the transfer of securities.20 Q. Which gets resolved with your proposed  
21 language?22 A. Yes. And the documentation of it gets  
23 resolved.24 Q. Do I understand you to be saying there  
25 was also a third issue in that somebody said if

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2 for any reason it is not permissible to transfer  
3 the government securities from the reserve  
4 account, Lehman has to make that up to Barclays  
5 with securities of some other value?6 A. I'm not sure I would describe it as a  
7 third issue, but as an adjunct to the second  
8 issue, that if the securities, these 769 million  
9 were not available, some other 769 million  
10 dollars of securities would be made available.11 Q. How did that, whatever you want to  
12 call it, an adjunct to the second issue or a  
13 third issue, how did that issue get raised?

14 A. How did it get raised?

15 MR. HUME: Objection, asked and  
16 answered.17 A. Someone on our side, maybe me, maybe  
18 somebody else who was there, I don't have a  
19 clear recollection on the second point, but  
20 said, well, if there is any contingency to the  
21 769 from the 3-3, we get them from somewhere.22 The whole purpose of this, again, was  
23 to say -- we were identifying a source of value  
24 that was in the deal in the light of other  
25 evaporating value, and so it was important to

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2 the Lehman side -- I am sorry, it was important  
3 to the Barclays side that if this wasn't  
4 available, some other asset would be available.5 Q. Was there any discussion about the  
6 implications for customer property claims --7 A. No, there was no discussion about  
8 customer property claims.9 Q. And there was no discussion of the  
10 implications on customers of transferring 769  
11 million --12 A. None of us, none of us on the Barclays  
13 side had anything like the information that  
14 would have been necessary to evaluate that, to  
15 even raise questions about it. That information  
16 was not available, and there was no way for it  
17 to become available and to be discussed and  
18 analyzed in a time frame that would have enabled  
19 the deal to close.20 MR. MORAG: Let him finish the  
21 questions.22 Q. Can you tell me -- you came away from  
23 this meeting with an understanding that Harvey  
24 Miller or someone on the Weil side had  
25 manifested assent to the proposition that if the

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2 government securities in the reserve account  
3 weren't available, some alternative similar  
4 securities would be provided.

5 Can you tell me, how are you -- how do  
6 you know that Mr. Miller or his colleague was  
7 agreeing to that unconditional transfer as  
8 opposed to his nod, his grunt, his smile,  
9 whatever you recall, meaning nothing more than  
10 this conversation is at an end or that we agree  
11 to your proposed language "to the extent  
12 permitted by applicable law"?

13 MR. MORAG: Object to the form.

14 A. I don't think I have more to add, more  
15 than what I have already said, except to say  
16 that a draft was provided to us by Weil that  
17 reflected that agreement.

18 Q. You got a draft from Weil which  
19 provided that Barclays -- that Lehman would  
20 transfer to Barclays 769 million from the  
21 reserve account or securities of a substantially  
22 similar nature. Are you aware of that?

23 A. I recall that.

24 Q. What was the reaction on the Barclays'  
25 side when you got that draft?

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2 A. We didn't know what "or nature" meant  
3 and whether it was clear that it meant that they  
4 would be of equivalent value. So we added the  
5 words "or value." I believe I may have made  
6 that change.

7 Q. Did you have any discussion with  
8 anyone at Weil to find out what they meant by  
9 adding the words "substantially similar,"  
10 without the words "in value"?

11 MR. MORAG: Objection, foundation.

12 You have not established that Weil added  
13 these words as opposed to mistyped or didn't  
14 type the Cleary proposal.

15 Q. Well, let me back up. I thought you  
16 said you were provided with a draft from Weil  
17 that included the words "substantially similar  
18 nature"?

19 A. I believe I was shown a draft that  
20 included that language, an interim draft that  
21 included that language.

22 Q. Do you know who provided you that  
23 draft?

24 A. I don't have a clear recollection, but  
25 my assumption is it was Weil. That's my  
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2 assumption.

3 Q. Did you have any discussion with Weil  
4 about that draft and specifically about those  
5 words in that draft?

6 A. Yes, in the sense that we provided a  
7 markup of it with the words "or value," and that  
8 seems to have been accepted as an appropriate  
9 clarification of the agreement that we had  
10 reached earlier and reflected in the next  
11 turnover of documents.

12 Q. Any communication between the Cleary  
13 and the Weil folk, other than --

14 A. Yes. The language "or value," which I  
15 think speaks for itself.

16 Q. I'm just saying, anything beyond that?

17 A. I don't think there needed to be  
18 anything beyond that.

19 Q. And have you heard from your partners  
20 whether they are aware of anything beyond that?

21 A. I don't have a recollection of  
22 discussing it.

23 MR. HUME: Are you going to finish  
24 before lunch or should we take a break for  
25 lunch or take another break? Either way I

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2 think we can use another break. We have  
3 been going for an hour and a half.

4 MR. MAGUIRE: Why don't we take a  
5 break, and if lunch is ready, this is a fine  
6 time for lunch. I certainly will continue  
7 after lunch.

8 MR. HUME: You will.

9 MR. MAGUIRE: Yes. I still have quite  
10 a bit to go.

11 (Recess)

12 BY MR. MAGUIRE:

13 Q. Sir, before the break, you were  
14 describing the hallway conversation at Weil  
15 Gotshal's offices concerning the 3-3 account,  
16 and I note that is a subject of paragraph 7 of  
17 your declaration; is that correct?

18 A. Yes.

19 Q. In paragraph 7, and you don't refer to  
20 the contingency that you described in your  
21 testimony earlier today concerning what would  
22 happen if Barclays did not get or Lehman could  
23 not transfer government securities from the 3-3  
24 account. Do you see that?

25 A. Um-hm.

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2 **Q. Can you tell me why you did not refer**  
3 **to that contingency in your declaration?**

4 A. No.

5 **Q. Earlier in your declaration, in**  
6 **paragraph 5, you refer both to the removed**  
7 **language that we have discussed earlier, the**  
8 **language that starts, "any and all property" --**  
9 **you remember that? -- and also to the**  
10 **parenthetical that ultimately ends up being**  
11 **inserted in the clarification letter, that's a**  
12 **parenthetical that reads, "and any property that**  
13 **may be held to secure obligations under such**  
14 **derivatives."**

15 A. Correct.

16 **Q. Can you tell me why when you posed the**  
17 **parenthetical, you didn't simply put the earlier**  
18 **language in the parenthetical?**

19 A. The only reason is that it was -- the  
20 original language had been obviously subject to  
21 modification, and I didn't want to get  
22 embroiled -- we didn't have time to get  
23 embroiled in sending back language and having  
24 extensive negotiations.

25 So the purpose of doing it this way

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2 was to do it as simply and clearly as possible  
3 and not resurrect language that might have  
4 been -- for other reasons raised issues in  
5 people's minds for reasons unrelated to the  
6 point that was intended to be conveyed here,  
7 clarified here.

8 **Q. By inserting the parenthetical, did**  
9 **you mean anything different from what you say in**  
10 **your declaration, paragraph 5 was documenting**  
11 **the business deal?**

12 MR. MORAG: Object to the form.

13 **Q. In other words, did you mean anything**  
14 **different in the language in the parenthetical**  
15 **from the earlier language that had been removed?**

16 MR. HUME: Objection, I think you are  
17 really calling for him to interpret the  
18 contract now.

19 MR. MAGUIRE: No, no, I am asking what  
20 he meant at the time.

21 A. What I will say is that I meant to  
22 express the thought reflected in the markup, but  
23 I didn't parse, because I didn't have time to  
24 parse the differences in the wording. And this  
25 was intended to pick up everything in a shorter

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2 and more concise formulation.

3 **Q. Do you know how much in value terms**  
4 **this parenthetical picked up?**

5 MR. MORAG: Objection to the form.

6 **Q. In other words, do you know how much**  
7 **property there actually was that was held to**  
8 **secure obligations under such derivatives?**

9 MR. HUME: The question is whether he  
10 knows today?

11 **Q. Did you know at the time what the**  
12 **dollar amount of that was?**

13 MR. MORAG: And I object, lack of  
14 foundation.

15 Go ahead.

16 A. I did not know the precise number, no.

17 **Q. Did you have a general understanding?**

18 A. I would have assumed it was a  
19 significant amount of, significant amount of  
20 money. Lehman was a very significant, one of  
21 the largest investment banks. They had a very  
22 significant business, and I would have assumed  
23 that with a significant business would come  
24 significant customer property to margin the  
25 proprietary and customer activities that were

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2 going on.

3 So the bigger it was, the more  
4 concerned I was about it.

5 **Q. Did you understand that the customer**  
6 **margin was in the billions of dollars?**

7 A. I didn't have specific knowledge of  
8 it, but it wouldn't surprise me to hear that. I  
9 expected it to be a large number.

10 **Q. Did you understand what the**  
11 **proprietary margin was that was in the billions**  
12 **of dollars?**

13 A. I would have expected it to be of that  
14 kind of magnitude, but I didn't know exactly  
15 what it was.

16 **Q. Do you know whether the folks at Weil**  
17 **had an understanding as to how much property was**  
18 **picked up by the parenthetical?**

19 MR. MORAG: Objection to the form and  
20 foundation.

21 A. All I'll say about that is that they  
22 had more ready access to that information  
23 through their client than we had.

24 **Q. What about the trustee, do you know**  
25 **whether the trustee had any knowledge about the**

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2 amount of the property that was the subject of  
3 that parenthetical?4 A. I can't speak to the state of mind of  
5 the trustee, but I assume that as part of this,  
6 the trustee was looking at what was there.7 Q. Is your answer the same with respect  
8 to the creditors committee?9 A. I've had no direct interaction with  
10 them, the creditors committee, such that I can  
11 recall.12 MR. MAGUIRE: We will mark as  
13 Exhibit 623 a document dated September 19,  
14 2008, Bates stamped GCGSH0002699 through  
15 700.16 (Exhibit 623, document Bates stamped  
17 CGSH0002699 through 700 marked for  
18 identification, as of this date.)19 A. Can I back up a second to your  
20 previous question? In terms of what the trustee  
21 and Weil knew about the amount of the margin,  
22 they would have known -- they were copied on  
23 e-mails which -- from OCC just in the context of  
24 OCC that suggested that just the pays and  
25 collects from -- for the Monday would have been  
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2 Weil actually received any information  
3 concerning pays or collects at the OCC prior to  
4 the closing?5 A. I believe they were copied on e-mail  
6 correspondence from the OCC, but that may be a  
7 misrecollection, but I believe there was a lot  
8 of correspondence including another e-mail that  
9 referred to a billion dollars and that confirmed  
10 that OCC was going to transfer all of that to  
11 Barclays, as we would have all expected.12 Q. And did you receive any response to  
13 Exhibit 623?14 A. I don't have a clear recollection of a  
15 specific response to this except that the SEC,  
16 after this interim exchange of communications  
17 regarding DTCC, stepped up to support the  
18 transaction, so presumably if they had had a  
19 problem, they would have raised it in connection  
20 with their support of the transaction.21 Q. We will mark as Exhibit 624 a document  
22 Bates stamped DTCC 00126 through 00198.23 (Exhibit 624, document Bates stamped  
24 DTCC 00126 through 00198 marked for  
25 identification, as of this date.)

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2 on the order of several hundreds of millions of  
3 dollars, which would have suggested an  
4 extraordinarily large amount of positions and  
5 therefore margin associated with them.6 So they could have inferred that it  
7 would be an extremely significant amount of  
8 margin.9 Q. When you refer to the pays and  
10 collects, what are you referring to?11 A. The accounts are marked on a periodic  
12 basis by the clearinghouse, and it was sort of  
13 what additional flows are coming in or going out  
14 between the clearinghouse and the clearing  
15 member as a result of the changes in the marks  
16 or the exercises of contracts or whatever other  
17 activity is being conducted in the account.

## 18 Q. And what's a pay?

19 A. Well, it depends on what your  
20 perspective is, but some amounts are paid by the  
21 clearinghouse to the clearing member, and there  
22 are amounts that are paid, so if you are  
23 receiving the funds, you are the collect, and if  
24 you are paying the funds, you're the pay.25 Q. Do you know whether the trustee or  
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2 Weil actually received any information  
3 concerning pays or collects at the OCC prior to  
4 the closing?5 A. I believe they were copied on e-mail  
6 correspondence from the OCC, but that may be a  
7 misrecollection, but I believe there was a lot  
8 of correspondence including another e-mail that  
9 referred to a billion dollars and that confirmed  
10 that OCC was going to transfer all of that to  
11 Barclays, as we would have all expected.12 Q. And did you receive any response to  
13 Exhibit 623?14 A. I don't have a clear recollection of a  
15 specific response to this except that the SEC,  
16 after this interim exchange of communications  
17 regarding DTCC, stepped up to support the  
18 transaction, so presumably if they had had a  
19 problem, they would have raised it in connection  
20 with their support of the transaction.21 Q. We will mark as Exhibit 624 a document  
22 Bates stamped DTCC 00126 through 00198.23 (Exhibit 624, document Bates stamped  
24 DTCC 00126 through 00198 marked for  
25 identification, as of this date.)

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2 Q. Is this an e-mail you received from  
3 DTCC on or about September 20, 2008?

4 A. Appears so.

5 Q. It is a lengthy document. I am really  
6 going to ask you only about one of the  
7 attachments, the contents.8 MR. MORAG: Just for the record, there  
9 do appear to be other e-mails starting at  
10 page 180 that may or may not be part of  
11 this. Since they are dated later, I don't  
12 know that they could have been part of the  
13 original e-mail.14 Q. I'm not going to ask you about  
15 anything after 178. But if you could take a  
16 look at the pages that begin 175.

17 A. Um-hm.

18 Q. You will see on page 176, the first  
19 paragraph concerns assumption of accounts.

20 A. Right.

21 Q. Was there at one point in time a  
22 discussion whereby Barclays was assuming the  
23 DTC -- the Lehman accounts at DTCC?

24 MR. MORAG: Object to the form.

25 MR. HUME: Object to the form.

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2 A. I am sorry, can you repeat the  
3 question.

4 **Q. Yes. With respect to paragraph 1 at**  
5 **the top of page 176, you see that's entitled**  
6 **"Assumption of Accounts." Do you recall that**  
7 **drafts were exchanged which provided that**  
8 **Barclays would assume the Lehman accounts at**  
9 **DTC?**

10 A. I believe in this form, I don't  
11 believe that Barclays had at this point agreed  
12 to do that. I know I got these documents. I  
13 know Michael Mazzuchi was looking at them. I  
14 don't recall focusing on them, because at the  
15 time that we got these, our client had not  
16 decided that it was going to assume the  
17 accounts. I said it was a potential outcome,  
18 but it was not one that had been agreed.

19 **Q. You will see paragraph 2 is entitled**  
20 **"Excluded Assets and Liabilities." Did you have**  
21 **any discussions with DTCC concerning excluding**  
22 **certain assets?**

23 MR. MORAG: Object to the form.

24 A. There were discussions with DTCC about  
25 what was in the accounts. There were

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2 discussions about whether or not or the extent  
3 to which Barclays was going to assume  
4 responsibilities for liabilities in the  
5 accounts, and there were discussions about, in  
6 recognition that there were assets that Barclays  
7 was getting as part of the transaction and  
8 assets that Barclays was not getting as part of  
9 the transaction, and all of those factors played  
10 into sort of the crucible of considerations as  
11 to how this would be -- how this situation with  
12 DTCC was going to be resolved.

13 But I think it was not until Sunday  
14 night that there was a meeting of the minds as  
15 to how this was going to be handled. There was  
16 a first amendment which reflected an arrangement  
17 which ultimately was -- couldn't be performed  
18 because of the unavailability of certain  
19 securities to be used as part of the -- what do  
20 you call it? -- as part of the credit support  
21 for DTCC.

22 **Q. You referred to discussions with DTCC**  
23 **concerning assets that Barclays was getting and**  
24 **assets that Barclays was not taking. Can you**  
25 **tell me what you know of those discussions?**

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2 A. What I said was there were assets that  
3 Barclays was taking and there were assets --  
4 there were assets that Barclays was not taking,  
5 and there were discussions with DTCC about  
6 should -- what the position at the DTCC  
7 subsidiary clearing organizations were, but I  
8 think in the end, they didn't proceed to a point  
9 where Barclays was comfortable assuming  
10 greater -- assuming responsibility for the  
11 financial obligations that were associated with  
12 the accounts.

13 **Q. I'm not going to ask you now about the**  
14 **assumption of liabilities or anything about**  
15 **assuming liabilities. I just want to ask you**  
16 **what you recall of your involvement in any**  
17 **discussions with DTCC concerning what assets**  
18 **Barclays was taking and what assets Barclays was**  
19 **not taking from the Lehman accounts at DTCC.**

20 A. Those discussions were held by an  
21 operations team, and I don't believe that there  
22 was a focus with DTCC on that. The focus on  
23 what assets were being sold and what were not  
24 and what liabilities was the deal documentation.  
25 DTCC was not a part of the negotiations about

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2 what Barclays was and wasn't taking, but there  
3 were extensive meetings about what the  
4 liabilities might be and what kind of recourse  
5 was going to be -- you know, what additional  
6 credit support DTCC might look for.

7 **Q. Were you aware that a Barclays due**  
8 **diligence team visited DTCC's offices?**

9 A. Yes.

10 **Q. To review the assets that were there?**

11 MR. MORAG: Object to the form.

12 A. I would say that there was a due  
13 diligence team that was trying to learn as much  
14 as it could about the accounts. But I'm not  
15 sure that there weren't potentially multiple  
16 objectives from their perspective.

17 **Q. Who, to your knowledge, was part of**  
18 **that operations team?**

19 A. Gerard Larocca is the individual that  
20 I corresponded with, but I believe he had an  
21 extensive team.

22 **Q. Anyone else you can remember?**

23 A. I don't remember the names in here,  
24 no. Maybe John Rodefeld.

25 **Q. Did any of the Barclays operations**

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2 team members report to you?

3 A. Well, we communicated. I wouldn't  
4 have described what they did as reporting to me.

5 **Q. Did any of them fill you in on any of**  
6 **their specific findings from their due**  
7 **diligence?**

8 A. I think they reported to --

9 MR. MORAG: It is a yes or no question  
10 on that. The substance may be privileged,  
11 so I think the answer is -- calls for a yes  
12 or a no.

13 A. That team did not report findings to  
14 me.

15 **Q. When you say "that team," you're**  
16 **referring to the due diligence team?**

17 A. The team, the operations team that was  
18 at DTCC.

19 **Q. Did you hear through any other source**  
20 **the findings of the Barclays due diligence team?**

21 MR. MORAG: Yes or no.

22 A. No.

23 **Q. Did you participate in any of the**  
24 **phone calls between any Barclays operations**  
25 **people on that due diligence team and**

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2 representatives of DTCC on Sunday, the Sunday  
3 night?

4 A. I may have participated in one call or  
5 sort of been in and out of the call while  
6 dealing with other issues, but I'm -- I don't  
7 have a clear recollection.

8 **Q. Do you recall anything of that call?**

9 A. I don't recall the specifics of the  
10 call.

11 **Q. Do you recall when it happened?**

12 A. At what time on Sunday, no.

13 **Q. Do you recall who participated?**

14 A. I don't have a specific recollection.

15 I could speculate based on who was involved in  
16 the conversations, but I don't have a specific  
17 recollection beyond, you know, it would have  
18 included Archie Cox and Jonathan Hughes, Gerard  
19 Larocca. As to the other participants, I just  
20 don't recall.

21 **Q. Do you recall anything that was said**  
22 **in that call?**

23 A. No. I recall the results of the call,  
24 but I don't recall the specific discussion.

25 **Q. Do you know who led the call on the**  
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2 Barclays side?

3 A. I'm not sure that there was a leader.  
4 There was a group convened to share information  
5 and reach conclusions.

6 **Q. Do you recall any Barclays persons**  
7 **speaking on that call?**

8 A. Since it was an internal Barclays  
9 call, yes, I mean there was an exchange of --

10 MR. MORAG: Wait.

11 MR. HUME: This is --

12 **Q. We may have misunderstood each other.**  
13 **I'm not asking about an internal Barclays call.**  
14 **I'm asking about your -- whether you have any**  
15 **knowledge of a call between Barclays operations**  
16 **people and folks at DTCC on the Sunday night.**

17 A. I am sorry, no.

18 **Q. Did you participate in any telephone**  
19 **call with anyone from DTCC on the Sunday?**

20 A. Yes.

21 **Q. How many calls?**

22 A. I honestly don't remember, but there  
23 could have been two or three or maybe three or  
24 four, or a long call that I walked in and out  
25 of. But there were continued discussions until

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2 quite late at night with DTCC.

3 **Q. Can you tell me on the Barclays side,**  
4 **who were the Barclays participants?**

5 A. Archie Cox, Jonathan Hughes, myself,  
6 Michael Klein. I -- Gerard Larocca, although  
7 I'm not sure that he was on all of the calls or  
8 on the calls all of the time.

9 **Q. And taking the wider Barclays group,**  
10 **you would include yourself as participating in**  
11 **those calls?**

12 A. I was in a room for a lot of those  
13 calls, not all of them.

14 **Q. Did you say anything on any of those**  
15 **calls?**

16 A. Did I say anything on those calls? I  
17 may very well have, but I don't have specific  
18 recollection of what I may have said.

19 **Q. Any general recollection?**

20 A. I really can't recall.

21 **Q. Anyone else from Cleary who**  
22 **participated in any of these calls?**

23 A. On Sunday night, I don't think so.

24 **Q. Do you recall anything that Archie Cox**  
25 **said on any of these calls?**

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2 A. He conveyed Barclays' reluctance to  
 3 assume the obligation to provide any form of  
 4 guarantee beyond the 250 million dollars  
 5 representing the holdback of that payment that  
 6 would otherwise have been made to Lehman under  
 7 the APA, and there would have been -- there was  
 8 a call -- there was a point at which he said, he  
 9 conveyed to DTCC that because Barclays was not  
 10 willing to accept more liability than that, they  
 11 would not be accepting the transfer of those  
 12 accounts.

13 Q. Anything else you remember Mr. Cox  
 14 saying in any of the Sunday night calls?

15 A. I really don't recall specifics.  
 16 There was undoubtedly a lot more discussed and a  
 17 lot more give and take, but candidly, I cannot  
 18 remember the specifics of the dialogues. There  
 19 would have been conversations about, gee, does  
 20 DTCC really need all the credit support that it  
 21 is asking for, can't it get comfortable, it has  
 22 better access to the information than Barclays  
 23 does. It would have been of that nature, but I  
 24 just, sitting here now, can't recall the  
 25 conversations.

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2 Q. Anything you recall Jonathan Hughes  
 3 saying?

4 A. Not really. I don't have a specific  
 5 recollection. I think -- I'm sure that he  
 6 reiterated or articulated many of the same  
 7 themes as Archie Cox, because the Barclays view  
 8 was, at that point, pretty well settled that  
 9 they were not prepared to assume additional  
 10 potentially substantial liabilities.

11 Q. Anything you recall Mr. Hughes saying  
 12 beyond what you said?

13 A. Not specific words, no.

14 Q. Anything you recall Michael Klein  
 15 saying?

16 A. No.

17 Q. Anything you recall Mr. Larocca  
 18 saying?

19 A. Well, there were a lot of  
 20 conversations also about sort of the pipes and  
 21 the plumbing and sort of the operational aspects  
 22 of what was going to be the mechanism for DTC to  
 23 effect the transfers of securities that needed  
 24 to be effected as part of the transactions, what  
 25 accountant are they going to go to or through,  
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2 or how that was going to be hooked up or  
 3 handled, but I was not focused on those because  
 4 I regarded them as essentially operational  
 5 matters.

6 Q. Was that an issue that was in  
 7 Mr. Larocca's purview?

8 A. Yes, I think so -- yes.

9 Q. Did he speak to that?

10 A. He did, and he may have delegated some  
 11 of the details of it to people who reported to  
 12 him.

13 Q. Do you recall Mr. Larocca saying in  
 14 any call on Sunday night or early Monday morning  
 15 we are not taking anything?

16 A. I do not recall Gerard Larocca saying  
 17 that or anyone else saying that, because it  
 18 was -- the whole purpose of the DTC endeavor was  
 19 to resolve their concerns in a manner that would  
 20 enable them to effect the transfers of assets  
 21 that were necessary to consummate the deal. So  
 22 it would have been a ludicrous thing for anyone  
 23 to have said, because otherwise, why did we need  
 24 to be dealing with DTCC?

25 Q. Was anyone from DTCC present for any  
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 2 of these discussions?

3 A. These -- they were on the phone.  
 4 There was nobody from DTCC in the room at Weil's  
 5 offices.

6 Q. Who did you understand was  
 7 participating from DTCC?

8 A. My understanding was that it was Larry  
 9 Thompson, the general counsel; his deputy, Isaac  
 10 Montal, Shelly Hirshon, their outside counsel,  
 11 and Don Donahue, the chairman of DTCC, at least  
 12 at some -- at least in some portions of the  
 13 conversation.

14 Q. And who was the person who did most of  
 15 the talking for DTCC?

16 A. My recollection was that it was Larry  
 17 Thompson.

18 Q. Did you understand at some point, DTCC  
 19 was considering issuing a cease to act with  
 20 respect to Lehman?

21 MR. MORAG: Object to the form.

22 A. After Barclays had conveyed to DTCC  
 23 that Barclays was not going to accept a transfer  
 24 of the accounts, I believe Larry Thompson  
 25 indicated -- and I don't recall exactly when  
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2 this was -- that they would issue a cease to  
 3 act, which meant that once the pipeline and  
 4 these transactions were transferred, DTCC would  
 5 be liquidating positions and closing out the  
 6 account and not accepting any other  
 7 transactions.

8 And I received a call from Don Donahue  
 9 to say, you know, if we could avoid doing that,  
 10 they would prefer to do that, because they  
 11 hadn't done it before, and which I told him I  
 12 would convey to the client.

13 **Q. Do you have an understanding of what**  
 14 **the consequences would be for the transaction if**  
 15 **the DTC were to issue a cease to act notice?**

16 MR. MORAG: Objection to form.

17 A. My understanding is that it wouldn't  
 18 have affected the transaction.

19 **Q. Did you have any discussion with**  
 20 **anyone as to whether Barclays could or would**  
 21 **close the transaction if DTCC issued a cease to**  
 22 **act notice?**

23 MR. MORAG: Again, Mr. Rosen, if your  
 24 discussions are with anybody outside of  
 25 Barclays, you can answer. Not -- if not,

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2 say you are not able to answer.

3 A. Would you mind repeating the question.

4 **Q. Yes. The question is whether you had**  
 5 **any discussion, any conversation with anyone**  
 6 **about whether Barclays could or would close the**  
 7 **transaction if DTCC were to issue a cease to**  
 8 **act.**

9 MR. MORAG: Do you have a time frame  
 10 on when the issuance was supposed to be?

11 A. It really --

12 **Q. Yes, the Sunday.**

13 A. Can I just -- let me just say this.

14 It really depends. Your question presupposes  
 15 with respect to what point in time the cease to  
 16 act would take effect.

17 If -- I did have a conversation with  
 18 Shari Leventhal at the Fed, which the substance  
 19 of which was that I expressed my concern that we  
 20 were not making rapid progress in the  
 21 negotiations with DTCC toward a resolution in  
 22 which they would accept a much more limited  
 23 amount of credit support, and I was worried that  
 24 we were running out of time, and we thought that  
 25 it might be helpful to let the Fed know, that we

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2 didn't want the Fed to find out at the last  
 3 minute that this thing was falling apart for  
 4 reasons unrelated to, you know, the actual  
 5 negotiation of the deal, that because of a  
 6 problem with DTCC.

7 So I spoke to Shari Leventhal and  
 8 said, if we can't reach a resolution with DTCC  
 9 and DTCC does not agree to process the  
 10 transactions, absent other arrangements, we are  
 11 not going to be able to close this, at least in  
 12 the manner in which we had contemplated.

13 And I did have that conversation with  
 14 her.

15 **Q. Can you help me out and explain,**  
 16 **because I thought you had told us that a cease**  
 17 **to act from DTCC would not have affected the**  
 18 **transaction, but I thought you also told us --**

19 A. I also told you it depends at what  
 20 point they are ceasing to act. And if they  
 21 cease to act following the processing of the  
 22 transaction and the transactions that are in  
 23 their pipeline, we would have been able to close  
 24 the transaction. If they said as of Saturday,  
 25 we are ceasing to act and we are not going to

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2 accept any other instructions on Monday to  
 3 transfer customer or proprietary agents, that  
 4 would have been a very different result than the  
 5 one which ultimately obtained.

6 **Q. And when you told us earlier that**  
 7 **after Barclays had made clear it was not**  
 8 **accepting the transfer of accounts and Larry**  
 9 **Thompson responded that DTCC would issue a cease**  
 10 **to act, what did you understand the timing of**  
 11 **that notice that he was talking about to be?**

12 A. My understanding was that DTCC was  
 13 going to issue a cease to act after processing  
 14 trades in the pipeline, including the transfers  
 15 that were necessary to implement the deal, and  
 16 that there had been operational calls, my  
 17 understanding was to sort of discuss the  
 18 plumbing and how you accomplish that.

19 **Q. So Mr. Thompson was simply telling you**  
 20 **that they would issue a cease to act after**  
 21 **clearing all the pipelines, all the uncleared**  
 22 **trades after the closing?**

23 A. Yeah, I didn't think -- I did not  
 24 understand him to be saying -- well, I'm going  
 25 to add some clarification to this. There was a

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2 point at which we were not, we did not have a  
 3 meeting of the minds with DTC about what, in  
 4 addition to 250, Barclays might make available,  
 5 and DTC, DTCC was not, had not yet agreed to  
 6 accept only the 250 million, so you had two  
 7 parties who were -- who lacked a meeting of the  
 8 minds.

9 In that context, Larry Thompson may  
 10 well have said basically, you know, if we don't  
 11 get what we want, we are just going to cease to  
 12 act and you are going to have to figure things  
 13 out for yourself. That was some of the need to  
 14 deal with that issue, so we could close  
 15 expeditiously and not have to create some kind  
 16 of a work-around, was precisely why we continued  
 17 the negotiations until DTCC would be willing to  
 18 process the transactions that were in the  
 19 pipeline and transactions that are associated  
 20 with this deal.

21 **Q. Was that comment by Mr. Thompson about**  
 22 **what they would do if they didn't get what they**  
 23 **wanted, was that in response to hearing from**  
 24 **Barclays that Barclays was not accepting**  
 25 **transfer of the accounts?**

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1 some point, Archie Cox described to DTCC  
 2 Barclays' reluctance to assume the accounts and  
 3 made plain that Barclays was not accepting the  
 4 transfer of the accounts of DTCC?

5 A. Yes.

6 **Q. That's correct?**

7 Now, what was -- in response to that,  
 8 did Mr. Thompson say in words or substance if  
 9 DTCC can't get happy, it will issue a cease to  
 10 act?

11 A. I don't recall it being specifically  
 12 in response to the -- you know, the articulation  
 13 of the final position or whether it occurred in  
 14 the course of earlier assertions of the  
 15 position. But it was clear in their minds that  
 16 if they didn't have a -- if they did not have  
 17 adequate credit support or a viable creditworthy  
 18 clearing member, that they were not going to  
 19 take the risk of just carrying the accounts open  
 20 and continuing to accept positions. They would  
 21 have to go through the process that they  
 22 described as ceasing to act.

23 **Q. And they made that clear to Barclays?**

24 A. Yes.

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2 A. Again, you have got to focus on the  
 3 time. I think at some point it was made clear  
 4 that not having the credit support meant that  
 5 after the cease to act, when a meeting of the --  
 6 when DTCC agreed that on the understanding that  
 7 it was going to get the 250 million in credit  
 8 support but no more, the fact that they would  
 9 have to cease to act was never presented by him  
 10 as, you know, something that would have  
 11 precluded the very reason that we were having  
 12 the negotiations, in order to enable the  
 13 transaction to close by processing and making  
 14 the transfers.

15 **Q. Let me try --**

16 A. You couldn't accept a transfer of  
 17 customer accounts and get that business if the  
 18 accounts couldn't be -- and the assets in them  
 19 couldn't be transferred by DTCC. Everybody  
 20 realized that they had to agree to do that and  
 21 not shut the pipes down.

22 **Q. Yeah, I'm not interested in what would**  
 23 **or could have happened. I want to get the**  
 24 **sequence of your recollection down right.**

25 **I understand that on Sunday night at**

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1 **Q. Can you tell me, what happened or what**  
 2 **was the event that triggered the decision by**  
 3 **Barclays that it would not accept a transfer of**  
 4 **accounts at DTCC?**

5 MR. MORAG: I caution you from  
 6 disclosing any privileged communications.

7 A. Can I consult on the privilege  
 8 question?

9 **Q. Sure.**

10 **(Recess)**

11 **Q. Would you like the question, sir? Can**  
 12 **you tell me what happened or what was the event**  
 13 **that triggered the decision by Barclays that it**  
 14 **would not accept a transfer of accounts at DTCC?**

15 A. After the report from the operations  
 16 team, of the operations team to their principal,  
 17 their principals, Archie Cox, the decision was  
 18 made that they would not -- they would not  
 19 accept the possibility of liabilities in excess  
 20 of 250 million dollars, and they confirmed to  
 21 DTCC that they were firm on their position they  
 22 weren't going to accept the accounts.

23 **Q. When was the report of the operations**  
 24 **team received?**

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2 A. Other than that it was earlier in the  
3 evening on Sunday, but possibly late, I don't  
4 have a specific recollection.

5 **Q. Do you have any sense of the timing as**  
6 **to when a decision was made by Barclays that it**  
7 **would not accept any liabilities beyond the 250**  
8 **million?**

9 A. Well, I think internally they had  
10 reached that position -- we were trying in good  
11 faith to see whether they could get enough  
12 information to make them comfortable, but it was  
13 finally communicated that they were firm on the  
14 250 and not accepting the accounts, maybe like  
15 11 o'clock, something like -- it was quite late  
16 on Sunday night.

17 **Q. And was that Mr. Cox who conveyed that**  
18 **to DTCC?**

19 A. I believe so, I believe so.

20 **Q. Was Larry Thompson on the call in**  
21 **which --**

22 A. I believe so.

23 **Q. He was?**

24 A. I believe so.

25 **Q. Did Mr. Thompson make a reference to**

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2 **issuing a cease to act on that call?**

3 A. I don't recall him specifically making  
4 a reference at that time in response to it. But  
5 to be clear, the understanding was that the  
6 cease to act was not in respect of the  
7 processing of any of the transactions that --  
8 any of the -- processing any of the transfers  
9 that were part of the transaction.

10 **Q. Now, when did you have the call with**  
11 **Shari Leventhal?**

12 A. Earlier in the evening. Whether it  
13 was at 5 o'clock or 8 o'clock or 9 o'clock, I  
14 don't honestly recall.

15 **Q. Did you have any follow-up call with**  
16 **her?**

17 A. I don't recall that I had a follow-on,  
18 one-on-one call with Shari. It's possible that  
19 I did, but they were on the open line which was  
20 established for the purpose of reporting to all  
21 people who needed to know simultaneously,  
22 because we were under a very tight time frame,  
23 sort of what was open and what was being agreed.

24 There was an open line with the Fed  
25 and the SEC and other interested parties, and I  
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2 believe that at least at some point, she was on  
3 to hear the results of the negotiations. She  
4 may have gotten information from DTCC, I just  
5 don't recall specifically.

6 **Q. Can you tell me what else you recall**  
7 **Larry Thompson saying in the various**  
8 **conversations on Sunday night?**

9 A. For the most part, I recall him  
10 justifying their need for collateral in excess  
11 of the 250 million dollars. That was the point  
12 at which they were willing to go forward on that  
13 basis.

14 **Q. How did he justify that?**

15 A. That they were -- his team, you know,  
16 were concerned about the risks.

17 **Q. Do you recall anything specifically**  
18 **said about the risks?**

19 A. Mostly my recollection is, you know,  
20 there is uncertainty, there is a lot in there to  
21 do, it would take time, we can't know exactly  
22 what the results of the liquidations will be. I  
23 mean they are a clearinghouse, they are a  
24 conservative organization, and they viewed the  
25 risk conservatively.

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2 **Q. Do you recall him saying anything**  
3 **further about a cease to act other than what you**  
4 **have told us?**

5 A. Nothing beyond what I told you.

6 **Q. Do you recall saying, addressing**  
7 **specifically the subject of whether the -- of**  
8 **when the cease to act would take effect and the**  
9 **impact that it would have on the transaction or**  
10 **on the unsettled trades that were at DTCC?**

11 MR. MORAG: Objection, asked and  
12 answered.

13 A. He never suggested that there would be  
14 any impact as the transaction was resolved. The  
15 purpose of the resolution was that there would  
16 be no impact.

17 **Q. Did he ever address whether the cease**  
18 **to act would have an impact on outstanding**  
19 **unsettled trades?**

20 A. Mostly what I recall him focusing on  
21 was they don't like to cease to act because it  
22 means that other participants in the marketplace  
23 aren't going to receive the benefit of the  
24 processing that they would otherwise do when  
25 those transactions came in, and hadn't had to do

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2 it in the past.

3 My impression was that they were more  
 4 concerned about the public relations  
 5 implications of a clearing corporation doing  
 6 that than they were focused on any impact on us,  
 7 because it was a mutual premise that the purpose  
 8 of this was to enable us to close and process  
 9 the transactions.

10 **Q. Did he ever say anything to indicate  
 11 that his references to cease to act related  
 12 exclusively to a notice that would come into  
 13 effect after the closing and after all of the  
 14 unprocessed, unsettled trades of Lehman had been  
 15 cleared by DTCC?**

16 MR. MORAG: Object to the form.

17 A. I think in going over the terms of the  
 18 arrangements it was clear that the transactions  
 19 that were the subject of the acquisition, those  
 20 transfers were going to be made, and I don't  
 21 think there was any implication of any kind, it  
 22 would have been absurd for there to have been an  
 23 implication that we reached an agreement with  
 24 DTC and by the way, they were going to not  
 25 process the transactions.

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2 **Q. Let me ask you about the time period  
 3 prior to reaching a meeting of the minds with  
 4 DTCC. At any time before that, did he give any  
 5 representation or assurance to Barclays that  
 6 while DTCC might issue a cease to act, it would  
 7 not affect the transaction, and that they would  
 8 honor and process all unsettled trades? Did he  
 9 say that in words or substance?**

10 A. I am sorry, can you repeat that.

11 **Q. Yes. At any time prior to the meeting  
 12 of the minds between Barclays and DTCC, did  
 13 Larry Thompson in words or substance say, we may  
 14 have to issue a cease to act, but it will not  
 15 affect the transaction, and notwithstanding our  
 16 cease to act, we will make sure that it takes  
 17 effect only after all unsettled trades have been  
 18 cleared?**

19 A. No. I think that if the -- if we  
 20 hadn't reached an agreement with DTCC, then we  
 21 had, we had the prospect of having to figure out  
 22 another way of consummating the transaction if  
 23 they were not going to process trades, and  
 24 basically what DTCC was saying was that if they  
 25 were going to continue to process trades and act

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2 for these accounts, then they wanted more credit  
 3 support than they would have if they were left  
 4 to look only to the assets of LBI.

5 **Q. Is there anything further you recall  
 6 Larry Thompson saying on the Sunday night other  
 7 than what you have told us?**

8 A. I'm sure there is a lot more that  
 9 could be said. I just don't have a specific  
 10 recollection of that.

11 **Q. And all my questions are just to your  
 12 recollection.**

13 **What about Mr. Montal? Do you recall  
 14 anything that Mr. Montal said in any of the  
 15 conversations on Sunday night or early Monday  
 16 morning?**

17 A. He was not a prominent speaker, at  
 18 least while I was in the room.

19 **Q. Anything that you recall?**

20 A. I don't have a specific recollection  
 21 of what he might have said.

22 **Q. What about Shelly Hirshon?**

23 A. I don't remember Shelly Hirshon  
 24 speaking of it.

25 **Q. You did tell us about Don Donahue**

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2 **making a call to you. Anything else that you  
 3 recall hearing from Dan Donahue on the Sunday  
 4 night?**

5 A. No. No more than that conversation.

6 **Q. I have been asking you now about the  
 7 conversations with DTC for some time limited to  
 8 the Sunday night, and I know that there were  
 9 conversations that may have spilled over into  
 10 the wee hours of early morning. So if we  
 11 include Monday morning, are there any  
 12 conversations by any of the participants that  
 13 you recall that you haven't told us about?**

14 A. I have a vague recollection that there  
 15 may have been continuing discussions on the  
 16 operations side in anticipation of the closing  
 17 of the transaction, and the balance of the  
 18 exchanges were between the lawyers trying to  
 19 reflect what had been agreed in I think what's  
 20 become or been referred to as the DTCC letter.

21 **Q. And anything else, if you recall?**

22 A. Not that I specifically recall,  
 23 sitting here.

24 **Q. We will mark as Exhibit 625 a document  
 25 Bates stamped DTCC 00359 through 361.**

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1 ROSEN  
 2 (Exhibit 625, document Bates stamped  
 3 DTCC 00359 through 361 marked for  
 4 identification, as of this date.)

5 A. I recall this.

6 Q. If you look at the e-mail at the top,  
 7 the first page, sir. Can you tell me what you  
 8 meant when you said, "The obligations and  
 9 entitlements in relation to the funds run  
 10 between DTC and the LBI estate, not between  
 11 Barclays and DTC"?

12 A. Because the credit support was going  
 13 to be limited to the 250 million dollar cash  
 14 payment, we thought that since we could direct  
 15 that payment, I thought that since it was  
 16 possible to direct that payment on Lehman's  
 17 behalf, so that the DTC got hold of it, it  
 18 was -- as far as the transaction was concerned,  
 19 that was an asset of -- that would otherwise  
 20 have been an asset of the estate that was being  
 21 made available to provide credit support, and  
 22 since it would otherwise have been an asset,  
 23 that the arrangements relating to that were  
 24 between Lehman and DTC and didn't need to be  
 25 between Barclays.

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1 ROSEN  
 2 Q. How did DTCC signal its agreement?

3 A. On a conference call, it -- Larry  
 4 Thompson said, we are willing to go forward on  
 5 this basis.

6 Q. And what was the specific thing he  
 7 said with respect to the basis?

8 A. That Barclays would not be assuming  
 9 the accounts and that the credit support that  
 10 would be made available would be limited to the  
 11 250 million dollar holdback on the purchase, on  
 12 the 250 million dollars.

13 Q. Is that something that you recall  
 14 Larry Thompson specifically saying?

15 A. I could be wrong, but that's my  
 16 recollection. My recollection is that Larry was  
 17 largely the spokesperson for DTC.

18 Q. And did Larry explain what prompted  
 19 DTCC to change its position?

20 A. No. I don't recall -- I don't recall  
 21 having an explanation from him.

22 Q. Did you have any understanding as to  
 23 what prompted DTCC to change its position?

24 A. I assume that -- all I can say is that  
 25 I assumed with more time, they got a better

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1 ROSEN  
 2 So my feeling was that to keep things  
 3 simple, we didn't really need to have a separate  
 4 agreement.

5 Q. Let me show you a document that's  
 6 previously been marked as Exhibit 606.

7 While we are waiting for that, sir,  
 8 how did the impasse between Barclays and DTC get  
 9 resolved? How did the parties reach a meeting  
 10 of the minds?

11 A. There were conversations staking out  
 12 positions. The parties would go off. There was  
 13 due diligence being done on both sides, because  
 14 both sides wanted to know what the risks were,  
 15 and they would get back on the telephone, and at  
 16 some point, DTC decided that the position that  
 17 had been articulated by Barclays was acceptable  
 18 to it.

19 Q. So DTC had previously refused to  
 20 accept Barclays' position of limiting the  
 21 recourse to 250 million, but it changed its mind  
 22 at some point on the Sunday or early Monday?

23 A. Until late on Sunday night, DTC had  
 24 not signaled its agreement to go forward based  
 25 on the 250 million dollars.

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1 ROSEN  
 2 Q. How did DTCC signal its agreement?

3 A. On a conference call, it -- Larry  
 4 Thompson said, we are willing to go forward on  
 5 this basis.

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 7 said with respect to the basis?

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 9 the accounts and that the credit support that  
 10 would be made available would be limited to the  
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 12 the 250 million dollars.

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 19 DTCC to change its position?

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 21 having an explanation from him.

22 Q. Did you have any understanding as to  
 23 what prompted DTCC to change its position?

24 A. I assume that -- all I can say is that  
 25 I assumed with more time, they got a better

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1 ROSEN  
 2 understanding of what the assets and the risks  
 3 were, and assumed that they decided that would  
 4 be acceptable for them, to take the liquidation  
 5 risk with the assets that they had in the  
 6 250 million.

7 But he didn't give us a  
 8 quantitative -- he didn't share his quantitative  
 9 analysis of their evaluation of that risk, nor  
 10 did we expect them to.

11 Q. When did this meeting of the minds  
 12 conversation happen?

13 A. It was very late on Sunday night.  
 14 Sometime before midnight, I think.

15 Q. Do you know whether it was before  
 16 midnight or after midnight?

17 A. I would have to refresh my  
 18 recollection.

19 Q. How would you do that?

20 A. I would look at the e-mail traffic.

21 Q. Anything else?

22 A. I think that is all that I would have  
 23 available to me today to help.

24 Q. I show you a document previously  
 25 marked as Exhibit 606. Sir, you received this

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## 1 ROSEN

2 e-mail?

3 A. Yes.

4 **Q. Does it -- do you see the reference to**  
5 "earlier this evening," the first line? Does  
6 that refresh your recollection as to -- the  
7 first line of the e-mail, cover e-mail, does  
8 that refresh your recollection as to when the  
9 agreement was reached?10 A. Well, I know it was before 3:43 a.m.  
11 How much before -- I remember we felt that we  
12 tended to wait a long time to get drafts back  
13 from the other side, but I don't recall.14 **Q. Who prepared this draft?**15 A. This was -- it appears to have been  
16 prepared by DTC or its counsel, but I don't know  
17 specifically.18 **Q. Did you have any discussions with DTCC**  
19 **or its counsel anytime after receiving this**  
20 **e-mail?**21 A. Most of the direct negotiations  
22 regarding this were conducted by my partner Mike  
23 Mazzuchi. I did exchange e-mails including, I  
24 guess it was slightly earlier in the evening,  
25 with Sheldon Hirshon. There may have been later  
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2 e-mails exchanges, I don't recall.

3 **Q. Leaving aside e-mails, do you know**  
4 whether Mike Mazzuchi had discussions with  
5 anyone at DTCC after circulating or the  
6 circulation of this draft that has been marked  
7 as Exhibit 606?8 A. Well, with their counsel, certainly.  
9 I don't recall whether or not he was, he had  
10 conversations that included individuals from  
11 DTCC.12 **Q. Do you know what conversations he had**  
13 **with their counsel?**14 A. Other than to discuss changes to this  
15 document prior to its finalization, I don't.16 **Q. And do you know whether there were in**  
17 **fact discussions as opposed to e-mail exchanges?**18 A. I don't -- I think it was principally  
19 exchanges of drafts. It was very late and  
20 people were very tired.21 **Q. If you turn to paragraph 1, sir, the**  
22 **winding down of accounts. Did you review this**  
23 **at the time?**24 A. I don't recall specifically whether I  
25 looked at this draft or a subsequent draft.

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2 **Q. Did you understand that, at the time**  
3 **this draft was received, that there was an**  
4 **agreement, a meeting of the minds between**  
5 **Barclays and DTC whereby all of the assets in**  
6 **the Lehman accounts at DTC were going to go to**  
7 **Barclays and the accounts themselves were going**  
8 **to stay at DTCC?**

9 MR. MORAG: Object to the form.

10 A. Could you repeat the question.

11 **Q. Did you have an understanding at the**  
12 **time you received this e-mail that there had --**  
13 **there was an agreement, a meeting of the minds**  
14 **between Barclays and DTCC?**

15 MR. MORAG: That's the only question?

16 MR. MAGUIRE: Yes.

17 A. Yes.

18 **Q. And did you understand that that**  
19 **agreement involved the accounts, the Lehman**  
20 **accounts staying at Lehman and at DTC?**

21 A. Yes.

22 **Q. Did you understand what was happening**  
23 **to the assets in those accounts?**24 A. Insofar as Barclays was concerned, our  
25 understanding was that the assets, whether they

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2 were proprietary assets or customer assets that  
3 under the deal terms were to be transferred,  
4 would be processed.5 **Q. And once those transactions were all**  
6 **processed, who owned the assets in the Lehman**  
7 **accounts at DTCC?**8 A. The residual assets that were not to  
9 be -- whatever we didn't -- whatever Barclays  
10 didn't buy or acquire was part of the Lehman  
11 estate.12 **Q. Did you have an understanding as to**  
13 **whether Barclays was acquiring any of the assets**  
14 **at the -- in the DTCC clearance boxes?**15 A. Yes. Yes, my understanding is that  
16 they were acquiring those assets.17 **Q. And so that at the closing, those**  
18 **assets would then belong to Barclays?**19 A. Contractually, yes, at the closing  
20 there would have been an agreement to transfer  
21 them to Barclays, an understanding that those  
22 transactions would be processed by DTCC and not  
23 be subject to a cease to act.24 **Q. And was that explained to the DTCC,**  
25 **that the assets in the Lehman accounts would**

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2 **contractually belong to Barclays at closing?**

3 A. The DTCC was provided at their request  
4 a draft of the agreement that reflected the --  
5 what do you call it? -- that reflected the  
6 agreements to transfer the clearance box assets  
7 as part of the deal.

8 **Q. A draft of the clarification letter?**

9 A. A draft of the letter, right.

10 **Q. Other than providing the DTCC with a**  
11 **draft of the clarification letter, did anyone on**  
12 **the Barclays side explain to DTCC that the**  
13 **assets --**

14 A. I believe that that was the subject of  
15 discussions on an operational level, because  
16 they wanted to impose a cease to act at some  
17 point, and they had to figure out a way to  
18 effect the transfers and do whatever else that  
19 they wanted to do under their rules.

20 **Q. Did you participate in any of the**  
21 **operations conversations in which anyone from**  
22 **the Barclays side explained to anyone on the**  
23 **DTCC side that all of the assets at, in the**  
24 **Lehman accounts at DTCC were being acquired by**  
25 **Barclays?**

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2 A. No, I don't think that I said that all  
3 of the assets in those accounts were being  
4 acquired. There are some assets that were being  
5 acquired, some assets that were not being  
6 acquired. There were customer accounts that  
7 were being transferred and presumably other  
8 customer accounts that were not part of the  
9 deal. I mean customer securities.

10 That was dealt with in the  
11 clarification letter. What Lehman was and was  
12 not selling to Barclays was not the subject of  
13 the DTCC letter. The DTCC letter from the  
14 beginning was about financial responsibilities  
15 to DTCC for the liabilities associated with  
16 those accounts.

17 **Q. And did anyone explain to DTCC that**  
18 **Barclays understood there to be a distinction**  
19 **between the accounts and the assets in the**  
20 **accounts?**

21 A. It would have been an absurd  
22 conversation to have with a clearing  
23 corporation, because a clearing corporation is  
24 basically structured fundamentally on the  
25 premise that there is a difference between legal  
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2 ownership and responsibility for accounts and  
3 beneficial ownership and entitlement to the  
4 assets in the accounts.

5 Without that distinction, every person  
6 who owns a security in the United States in  
7 order to own it would have to be a clearing  
8 member of a clearing corporation, which is not  
9 how we would realize our financial markets.

10 **Q. You are not aware of any conversation**  
11 **between anyone at Barclays, working for**  
12 **Barclays, and anyone at DTCC concerning any**  
13 **distinction between the Lehman accounts and the**  
14 **assets in the Lehman accounts at DTCC?**

15 MR. HUME: Objection, asked and  
16 answered.

17 A. I don't have anything to add.

18 **Q. Did it come to your attention that**  
19 **DTCC was of the understanding that the assets in**  
20 **the Lehman account were remaining with the**  
21 **estate?**

22 A. It is impossible for me to understand  
23 how they could have formed that view or that  
24 they -- and I am unaware that they did form that  
25 view.

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2 **Q. If you look, sir, at paragraph 1 of**  
3 **the draft before you marked as Exhibit 606, you**  
4 **will see the second part of that section 1, same**  
5 **paragraph really of that section 1, says, "As**  
6 **part of this closeout process, the trustee**  
7 **hereby authorizes DTC to accept and act upon**  
8 **instructions from NSCC to deliver securities**  
9 **from the DTC LBI account to NSCC's account," and**  
10 **it goes on. Do you see that sentence?**

11 A. I do.

12 **Q. Can you explain why the parties were**  
13 **providing for the trustee to exercise authority**  
14 **over assets in the Lehman account if those**  
15 **assets contractually were understood all along**  
16 **to belong to Barclays?**

17 MR. MORAG: Objection,  
18 mischaracterizes his testimony. For the  
19 third time.

20 A. And I think you're asking me to  
21 interpret what the import of this is, because I  
22 don't accept your characterization of what this  
23 does or -- what this provision does or says.

24 **Q. So you would --**

25 A. I think I would decline to answer on  
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2 the grounds that I think my interpretation of  
3 this provision would be privileged.

4 **Q. At the time that this draft was**  
5 **received, did you understand that Barclays was**  
6 **taking -- was cherry picking or at least taking**  
7 **certain assets from the clearance box and not**  
8 **other assets, or at least that it had that**  
9 **option?**

10 MR. MORAG: Objection, compound.

11 A. Why don't you ask the first question.

12 **Q. Sure. What I am trying to understand**  
13 **is, at the time that this draft is circulated,**  
14 **what is your understanding of the business deal**  
15 **between Barclays and the estate?**

16 A. I was not -- I was not aware -- I  
17 don't know it to be the case, sitting here  
18 today, that there were clearance box assets that  
19 Barclays had decided they didn't want.

20 **Q. Did you understand that Barclays had**  
21 **the ability to either return or not take certain**  
22 **clearance box assets?**

23 A. I'm not sure at that time that I had  
24 focused on the language that you showed me  
25 earlier today.

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2 **Q. Did you raise any question with DTCC**  
3 **or anyone else as to why there was not any**  
4 **mechanism here for separating out the assets**  
5 **that were being taken by Barclays and the assets**  
6 **that Barclays did not choose to take from the**  
7 **DTC clearance boxes?**

8 A. No, because at that point, I was under  
9 the impression that Barclays was taking all of  
10 the clearance box assets, which it was their  
11 ability to do or not do, as they decided at any  
12 time. I think there was a lack of -- I don't  
13 know how clearly it was understood what all of  
14 those assets were.

15 **Q. I'll show you next a document that has**  
16 **been marked as Exhibit 607.**

17 MR. HUME: How much more do you have?  
18 And would it make sense to take a break at  
19 some point afternoon then finish?

20 MR. MAGUIRE: I can finish this in  
21 five minutes and that might be a better time  
22 to take a break.

23 **Q. This is an e-mail that your colleague,**  
24 **Mr. Mazzuchi circulated?**

25 A. Um-hm.

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2 **Q. I note in this draft and the prior**  
3 **draft, there is a signature line for James B.**  
4 **Giddens as trustee for the liquidation of Lehman**  
5 **Brothers. And the signature line is for James**  
6 **B. Kobak, Jr. Do you see that?**

7 A. Um-hm.

8 **Q. Did you have any discussions with**  
9 **Mr. Kobak concerning this agreement?**

10 A. I did not have a verbal conversation  
11 with James Kobak about this agreement, but he  
12 was provided the various drafts that were  
13 exchanged.

14 **Q. And made comments?**

15 A. As far as I'm aware, yes.

16 **Q. You see Mr. Mazzuchi's cover e-mail**  
17 **says, "Further to Ed Rosen's discussion with**  
18 **Sheldon, attached is a revised draft of the**  
19 **recourse arrangement for the 250 million dollar**  
20 **purchase price. This also reflects comments**  
21 **from Lehman."**

22 **Did you understand that to be a**  
23 **reference to comments from the trustee's**  
24 **representatives?**

25 A. I don't know.

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2 **Q. Do you know whether this agreement was**  
3 **discussed with anyone from Weil Gotshal?**

4 **WITNESS' ATTORNEY: Are you referring**  
5 **to the DTC letter in general or this draft**  
6 **in particular?**

7 **Q. The DTC letter in general.**

8 A. I do not recall.

9 **Q. Do you know whether Weil was provided**  
10 **with any draft of the DTC letter agreement?**

11 A. Yes, it would have been on the closing  
12 table and it may have been provided separately  
13 by Shelly Hirshorn.

14 **Q. Other than it being on the closing**  
15 **table and whether Mr. Hirshorn did or did not**  
16 **provide it, do you think whether anyone**  
17 **otherwise provided either the final agreement or**  
18 **a draft of the DTC letter agreement to anyone at**  
19 **Weil?**

20 A. I don't have a recollection. They may  
21 well have been in the room. The rooms weren't  
22 closed off. They may have participated in  
23 reviewing the exchanges of draft. I just don't  
24 have a specific recollection. Again, at this  
25 time, I was in and out of the documentation,

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2 also working on other problems.

3 Q. In which room was the DTC letter  
4 agreement put together -- speaking now to Cleary  
5 and the Barclays representatives -- which room  
6 at Weil were you working in?

7 WITNESS' ATTORNEY: Objection,  
8 compound. It is two different questions.

9 A. Yeah, I don't know how to describe,  
10 there was a room on a floor and I was not  
11 located in a particular room. I jockeyed  
12 between several rooms.

13 Q. Where was the, speaking specifically  
14 now to the DTCC negotiations, telephone calls  
15 and the drafting, in which room did that happen?

16 A. That happened in a room on a different  
17 floor.

18 Q. Do you know what floor?

19 A. I believe it was the floor below the  
20 floor where the other meetings were taking  
21 place.

22 Q. Were there any other Lehman-related  
23 conference rooms in use on that lower floor?

24 A. I don't, I don't recall.

25 Q. Did anyone from Cleary instruct anyone

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2 from Weil that they were not permitted into that  
3 room?

4 A. No, not that I am aware.

5 Q. Have you -- at the beginning of  
6 Mr. Mazzuchi's e-mail, he says, "Further to Ed  
7 Rosen's discussion with Sheldon," do you know  
8 what that discussion refers to?

9 A. I think it refers to the same issue  
10 that's reflected in the earlier exchange of  
11 e-mail in which we were taking the view that  
12 this was a limited recourse form of credit  
13 support and not a guarantee of Barclays. This  
14 was an asset that would otherwise have been paid  
15 to the estate as part of the transaction that  
16 was being made available to secure additional  
17 credit support to DTCC and its related  
18 affiliates, and I thought that describing it as  
19 a guarantee by Barclays was not entirely  
20 accurate.

21 Q. OK.

22 MR. MAGUIRE: This is probably a good  
23 time to take a break.

24 (Recess)

25 Q. I will show you a document we have

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2 previously marked as Exhibit 563C. Have you  
3 ever seen that letter before?

4 A. Again, yes, without verifying how  
5 closely it tracks the actual agreement.

6 Q. If you turn, sir, to page 4, there is  
7 a sentence beginning at the first full paragraph  
8 that starts, "By Sunday night, September 21."  
9 Do you see that sentence?

10 A. Um-hm, yes.

11 Q. I give that to you as background. My  
12 question is whether on any of the Sunday night  
13 or Monday morning conversations anyone from DTCC  
14 said in words, substance that they believed that  
15 DTCC's exposure to Lehman from processing the  
16 remaining transactions was substantially less  
17 than it originally feared?

18 A. I think implicitly by them saying they  
19 had become comfortable with the internal review  
20 that they were doing, they would be willing to  
21 close the transaction with 250 million.

22 Q. So the fact that there was a meeting  
23 of the minds suggests that DTCC had become more  
24 comfortable with its exposure?

25 A. They may have said that we have

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2 continued to review this and we have gotten to  
3 that point based on the review. I don't recall  
4 specifically.

5 Q. Do you have any recollection of that?

6 MR. HUME: Objection, asked and  
7 answered.

8 Q. The reason I ask is because you say  
9 specifically?

10 A. I have an impression that that was  
11 what was conveyed, that they had gotten  
12 comfortable with the risk. But I don't have a  
13 specific recollection of a specific articulation  
14 from the calls.

15 Q. I'll show you a document that has  
16 previously been marked as Exhibit 156B. It is  
17 actually not entirely clear, but it is a letter  
18 from Cleary Gottlieb dated March 6, 2009. Do  
19 you know whether you have ever seen that letter  
20 before, sir?

21 A. I may have seen a draft of this  
22 letter. I don't have a specific recollection.

23 Q. My only questions, sir, are with  
24 respect to page 3 of this letter, the second  
25 full sentence on page 3, starts, "Nothing in

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2 this letter or in Exhibit B should be construed  
 3 to suggest."

4 Do you see that?

5 A. Yes.

6 Q. Do you have an understanding, sir, as  
 7 to what that sentence means, of Mr. Kobak's  
 8 letter?

9 A. To be honest with you, I would have to  
 10 look at -- I would have to read the entire  
 11 letter in order to put that sentence in context.

12 WITNESS' ATTORNEY: Maybe we could  
 13 discuss this off the record and I could  
 14 explain it to you.

15 Q. Sure, that would be helpful. Let me  
 16 just ask you then if you have an understanding  
 17 that the securities in the Lehman -- that  
 18 Barclays acquired the securities in the Lehman  
 19 clearance boxes at the time of closing  
 20 regardless of whether any customers had long  
 21 positions in those securities?

22 MR. HUME: I think you're asking the  
 23 witness to interpret the contract when you  
 24 ask that question. If you want to ask him a  
 25 factual question about a discussion, that's

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2 fine, but to interpret precisely which  
 3 securities are covered by the clearance box  
 4 provision of the clarification letter just  
 5 seems like you're asking him a legal  
 6 interpretation question.

7 Q. You can answer.

8 MR. HUME: Well, you can't answer to  
 9 the extent it would reveal attorney work  
 10 product analysis that we have done and I  
 11 think beyond that --

12 A. I think answering the question would  
 13 call for me to interpret the contractual  
 14 documents.

15 Q. Let me leave aside the contractual  
 16 documents. Just as a matter of the business  
 17 deal that was negotiated, did you understand the  
 18 business agreement between the parties was that  
 19 Barclays was getting the assets in the clearance  
 20 boxes that were not owned by customers or did  
 21 you understand that Barclays was getting the  
 22 assets in the clearance boxes notwithstanding  
 23 whether any customer had had a long position?

24 A. My understanding was that they were  
 25 getting what was in the clearance boxes.

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2 Q. And that's regardless of what  
 3 customers had long positions in those  
 4 securities?

5 A. It is based on there being lien-free  
 6 securities.

7 Q. So the fact that customers had long  
 8 positions did not affect Barclays' rights?

9 A. I think you're asking me to interpret  
 10 the implications of those provisions in the  
 11 clearance box, relating to the clearance box.

12 Q. I'm just asking you to tell me what  
 13 you just told me?

14 A. You're asking me to interpret whether  
 15 the reference to the clearance box, the extent  
 16 to which it covered certain kinds of assets and  
 17 that's asking me to interpret a term of the  
 18 agreement.

19 Q. Leaving aside the agreement, just the  
 20 business deal, just the business deal between  
 21 the parties, did you understand --

22 A. The business deal, as far as I was  
 23 aware, did not include a limitation on the  
 24 clearance box assets that Barclays was getting  
 25 as far as I recall.

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2 MR. MAGUIRE: We will mark as Exhibit  
 3 626 a document Bates stamped BCI-CG 0024097  
 4 through 99.

5 (Exhibit 626, document Bates stamped  
 6 BCI-CG 00024097 through 99 marked for  
 7 identification, as of this date.)

8 Q. Had you received this e-mail chain  
 9 from Mr. McDaniel, sir?

10 A. I did.

11 Q. And you had learned at some point that  
 12 there was 1 billion dollars in cash margin at  
 13 the OCC?

14 A. Could you repeat your question.

15 Q. Yes, you learned at some point there  
 16 was 1 billion dollars in cash that the OCC was  
 17 holding for the accounts of LBI?

18 A. That is in here, yes.

19 Q. And that was in addition to government  
 20 securities that were being held at JP Morgan  
 21 Chase?

22 A. It presumably is additional to any  
 23 other collateral that would have been noncash.

24 Q. And you asked Jim for more information  
 25 about the 1 billion dollars?

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 2 WITNESS' ATTORNEY: Object to the  
 3 characterization.

4 Q. Specifically, you asked him whether it  
 5 was excess margin?

6 A. Yeah.

7 Q. Tell me why you asked that question.

8 A. Yes. Barclays was -- by agreeing to  
 9 step into Lehman's shoes under the TAA, it was  
 10 stepping into the responsibility to perform all  
 11 of the obligations for all positions that were  
 12 in the account up until the day at some point in  
 13 the future when the positions in the account  
 14 were ultimately liquidated and there was no  
 15 further exposure.

16 One of the things that I was trying to  
 17 ascertain was whether or not, if Barclays  
 18 stepped into the -- into Lehman's shoes, whether  
 19 in addition to the ongoing liabilities that it  
 20 was going to assume while the positions in those  
 21 accounts were outstanding, it was stepping into  
 22 a day one liability, and in addition, the extent  
 23 to which there was what would have been from  
 24 OCC's perspective an excess requirement which is  
 25 not necessarily obviously the same as whether

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 2 there is an excess from the clearing brokers'  
 3 requirement.

4 There are very few, if any, clearing  
 5 brokers who limit the amount of margin that they  
 6 collect across their customer base to the amount  
 7 that's required at the clearing house,  
 8 particularly in the case of less creditworthy  
 9 customers. So this was part of an endeavor to  
 10 get our arms around how much potential liability  
 11 Barclays might be stepping into in taking on  
 12 these accounts.

13 Q. And what did you learn?

14 A. Not a lot. Not as much as we would  
 15 have liked to have learned. What we learned was  
 16 that over the weekend, I received an e-mail that  
 17 suggested that there was -- it was an e-mail  
 18 forwarded to me by Bill Navin, I'm sure it is in  
 19 the record, that it looked like there were net  
 20 in-flows to the clearing accounts expected on  
 21 Monday at the open of business.

22 So that suggested to me that if we  
 23 closed on Monday morning, at least on Monday  
 24 morning -- obviously you can't speak to Monday  
 25 night or Tuesday morning -- as far as Monday

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 2 morning when they closed, Barclays would not  
 3 have to have coughed up a significant amount of  
 4 additional margin to be held at OCC.

5 I also learned though one of the  
 6 things that we wanted to find out about, as I  
 7 say, there are two dimensions to the risk that  
 8 you assume when you do this. One dimension to  
 9 the risk is the liability you assume as of the  
 10 pre-existing mark to market by the clearing  
 11 corporation and the other is the risk that you  
 12 assume with respect to positions that are in  
 13 there, particularly if they are positions of  
 14 someone who is not creditworthy and may not be  
 15 good for the payment.

16 And so I asked the question whether or  
 17 not there looked to be positions that could  
 18 entail that kind of risk and was told yes and  
 19 one position in particular that was identified  
 20 was a position of an affiliate, I don't remember  
 21 which affiliate of Lehman that was, a very  
 22 substantial position in what was called a VIX  
 23 future contract that the OCC cleared that was  
 24 regarded as being so large that it would have  
 25 taken a very significant amount of time to

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 2 liquidate it and because it was on market  
 3 volatility at that point in time, it was a -- it  
 4 was basically opposite the most volatile market  
 5 reference and there was significant concern, for  
 6 example, that it may take many million, tens of  
 7 millions of dollars before that position could  
 8 be liquidated.

9 There was separately some effort that  
 10 I saw in an e-mail to provide better information  
 11 about sort of what the collateral was, what the  
 12 positions were. But those positions were not  
 13 made available in a way that would have enabled  
 14 Barclays to fully sort of model and understand  
 15 the respective risks.

16 So they were not ultimately aware how  
 17 much risk they were assuming by assuming  
 18 financial responsibility for those. But it did  
 19 appear that at least at the moment that the  
 20 transaction was concluded, there wouldn't have  
 21 been a shortfall that they would necessarily  
 22 have to make up.

23 But it was equally true that the  
 24 hundreds of millions or billions that were going  
 25 in on Monday morning could have gone out on

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2 Tuesday morning because that was the volatility  
 3 from just one mark to another. So there was  
 4 obviously a substantial amount of risk in a  
 5 market with very substantial volatility.

6 So we tried to find out what we could,  
 7 but it was a very mixed picture with a potential  
 8 significant downside.

9 **Q. And the risk, as you understood it,  
 10 was concentrated in what would happen after  
 11 closing as opposed to inherent in any of the  
 12 positions as of closing?**

13 A. It was that -- yes, let me put it  
 14 differently, I would say that the amount of  
 15 immediate payment obligations seemed to be  
 16 known, unless the market or the facts changed in  
 17 a way between the time we got that e-mail and  
 18 what happened when it opened. It could  
 19 conceivably have been some event in an early  
 20 open in Asia that caused the markets to tank so  
 21 significantly that OCC would have said, sorry,  
 22 we need another mark. But it didn't -- there  
 23 wasn't -- there wasn't a clear obligation to pay  
 24 out money on Monday morning to the OCC.

25 **Q. Did Barclays do anything to protect**

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2 **itself against the uncreditworthy affiliate and  
 3 its VIX futures position?**

4 A. I think it just decided to take the  
 5 risk of that with the balance of the  
 6 arrangements. There was nothing it could have  
 7 done in terms of Monday. The markets weren't  
 8 open to close out the positions and the reason  
 9 there was a significant risk was because the  
 10 position couldn't have been closed out that  
 11 quickly because it was apparently so large in  
 12 relation to the liquidity of the market for  
 13 contract.

14 MR. MAGUIRE: We will mark as Exhibit  
 15 627 a document Bates stamped CGSH 00034491  
 16 through 92.

17 (Exhibit 627, document Bates stamped  
 18 CGSH 0034491 through 92 marked for  
 19 identification, as of this date.)

20 **Q. Is this an e-mail you received from  
 21 Bill Navin on the Sunday?**

22 A. Yes, yes, it is. It was on Sunday  
 23 morning.

24 **Q. And he provides in this the  
 25 information concerning the collects, that is the**

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2 **amount that the OCC would pay to the clearing  
 3 member, in this case to Lehman or its successor,  
 4 Barclays, on Monday morning, right?**

5 A. The witness is nodding, the deponent  
 6 is nodding. Yes.

7 **Q. And you understand in each case, the  
 8 collect was a positive, meaning that payment  
 9 from the OCC to Lehman or, following closing, to  
 10 Barclays?**

11 A. Well, let me just say that I forwarded  
 12 this on to Barclays to interpret, but my lay  
 13 reading of this would be that these were net  
 14 collects to the clearing member.

15 **Q. So you understood this at the time you  
 16 received it?**

17 A. I understood it the way I described to  
 18 you, yes.

19 **Q. And you understood the payments to  
 20 Barclays would be in the hundreds of millions of  
 21 dollars?**

22 A. Yes.

23 MR. MAGUIRE: We will mark as Exhibit  
 24 628 a document Bates stamped OCC 0036408  
 25 through 409.

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2 (Exhibit 628, document Bates stamped  
 3 OCC36408 through 409 marked for  
 4 identification, as of this date.)

5 **Q. Is this an e-mail you received from  
 6 Jim McDaniel on the previous day, Saturday,  
 7 September 20?**

8 A. Yes.

9 **Q. You will see the first question that  
 10 Jim McDaniel raises is how much of the billion  
 11 dollars in cash will be transferred to Barclays  
 12 at the closing. Do you know what happened to  
 13 that?**

14 A. I believe it was transferred.

15 **Q. The entire 1 billion?**

16 A. Yeah, it would have been the deal that  
 17 all of that margin was transferred.

18 **Q. The second question he asks is how  
 19 would Barclays replace the 252 million in  
 20 letters of credit. Do you know what happened  
 21 about that?**

22 A. I'm not sure, but I think they may  
 23 have called down those letters of credit because  
 24 they were going to lapse and they wanted to make  
 25 sure they had enough -- I'm not certain -- I

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2 know that they did call down some. I'm not sure  
3 whether it is these particular letters of  
4 credit.

5 **Q. Do you know what happened with respect**  
6 **to the 927 million in government securities at**  
7 **JPM?**

8 A. I don't, I'm not certain, but they may  
9 have been part of a body of securities that are  
10 in dispute as to how they are going to be  
11 allocated that we -- I think the documents make  
12 pretty clear were supposed to be transferred to  
13 Barclays.

14 **Q. Mr. McDaniel ends the e-mail talking**  
15 **about excess margin and he talks about how**  
16 **preliminary numbers actually showed a 5.1**  
17 **million margin deficit, do you see that? Did**  
18 **you get any update on the margin situation?**

19 A. I didn't, but I was under the  
20 impression at this time that -- and I can't  
21 remember the timing, that Barclays was going to  
22 do what it could to focus on this. I wanted to  
23 get the process started, but I was certainly not  
24 doing the credit analysis and deciding what was  
25 and wasn't acceptable to Barclays.

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2 **WITNESS' ATTORNEY: Objection to the**  
3 **form. Time frame.**

4 **Q. Any time before the closing?**

5 **WITNESS' ATTORNEY: What's the date of**  
6 **the statement?**

7 **Q. The statement meaning statement of**  
8 **Lehman's positions as of the close of business**  
9 **on Friday?**

10 A. I don't know what those positions were  
11 and I never saw that statement.

12 **Q. Nobody told you what the amount of the**  
13 **excess margin was?**

14 A. No, not -- I did not have information  
15 other than -- I don't recall having information  
16 other than the information transmitted by e-mail  
17 that I was copied on. If it came through my  
18 e-mail box, I may have just not have focused on  
19 it.

20 **MR. MAGUIRE: We will mark as Exhibit**  
21 **629 a document Bates stamped OCC 0036472**  
22 **through 36473.**

23 **(Exhibit 629, document Bates stamped**  
24 **OCC 0036472 through 36473 marked for**  
25 **identification, as of this date.)**

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2 **Q. So you understood somebody at Barclays**  
3 **was following up and doing the credit analysis?**

4 A. Doing what they could. I believe they  
5 were limited in their ability to do a fully  
6 satisfactory credit analysis because they didn't  
7 have in a form that was electronic that they  
8 could have manipulated the transaction data that  
9 would have enabled them to evaluate the risk.

10 So I think to a certain extent, they  
11 were assuming a significant risk in going  
12 forward because they really didn't know  
13 themselves what the likely statistical outcomes  
14 were for the portfolio.

15 **Q. Did Barclays obtain a statement from**  
16 **the OCC on Lehman's accounts?**

17 A. I believe that I saw an e-mail that  
18 indicated that OCC had provided some data on  
19 collateral and positions to Barclays personnel.  
20 I did not see the data and I don't know  
21 firsthand that it was received or what it was,  
22 but I believe so.

23 **Q. Did anyone tell you what the statement**  
24 **showed in terms of the excess margin, the amount**  
25 **of excess margin at the OCC?**

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2 **Q. You sent this e-mail to Mr. McDaniel**  
3 **on Sunday, September 21?**

4 A. Yes.

5 **Q. He had raised a question with you in**  
6 **his prior e-mail to which you were responding.**

7 **Do you see that?**

8 A. Um-hm, yes, I do.

9 **Q. And he is referring to the letter**  
10 **draft raising a specific issue about assumed**  
11 **liabilities. Do you see that?**

12 A. Yes.

13 **Q. And he notes that the current draft**  
14 **would appear to say that Barclays is not**  
15 **assuming liabilities represented by the short**  
16 **option positions in the accounts of Lehman at**  
17 **OCC. Did you have any discussion with him about**  
18 **that?**

19 A. He responds at the top of the page.

20 **Q. Did you have any verbal discussion**  
21 **with him about that?**

22 A. No, just what I communicated to him  
23 and I assume that he accepted my explanation.  
24 Which is -- sorry.

25 **Q. Did you at the time agree with his**  
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2 **observation that the draft --**

3 A. I didn't analyze it because I didn't  
4 think that it was relevant. If Barclays signed  
5 on to the asset transfer agreement and had  
6 separately reached some other agreement about  
7 what was going to happen with respect to assets in  
8 the account that would not have limited  
9 Barclays' obligations having stepped into the  
10 transferred assumption agreement.

11 So I didn't regard the clarification  
12 letter as a limiting Barclays' obligation to  
13 OCC, whatever the net result of the entitlements  
14 and obligations between Lehman and Barclays.

15 **Q. You are getting a little ahead of me.**  
16 **Let me ask you first, he is asking you about the**  
17 **intention. Do you see that, the intention of**  
18 **the clarification letter?**

19 A. Yes.

20 **Q. So my first question is, was it the**  
21 **intention in the clarification letter to say**  
22 **that Barclays was not assuming liabilities**  
23 **represented by short option positions?**

24 A. I didn't evaluate that because I did  
25 not think it was relevant to DTCC and so my  
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2 responsibility -- I am sorry, to OCC, and my  
3 response was basically to say that the TAA  
4 speaks for itself on what our liabilities are to  
5 the OCC.

6 **Q. I think I understand your answer and I**  
7 **don't want to follow up on any evaluation that**  
8 **you did or did not do. I am really asking about**  
9 **the intention, not the evaluation of any**  
10 **contractual language.**

11 **Was the intention of the parties as**  
12 **you understood it that Barclays was not assuming**  
13 **liabilities represented by short option**  
14 **positions in the accounts of Lehman at the OCC?**

15 A. As between Barclays and Lehman, I  
16 would have to refresh my recollection of the  
17 definition of excluded liabilities to answer  
18 that question and it probably would have to call  
19 for me to interpret it.

20 **Q. Why don't we give you the final**  
21 **clarification letter and see, it is Exhibit 25,**  
22 **which should be in front of you.**

23 **WITNESS' ATTORNEY: I don't think you**  
24 **ever showed him 25.**

25 **Q. Here you are, sir.**

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2 A. I think I need the APA as well.

3 **Q. That's Exhibit 1.**

4 **WITNESS' ATTORNEY: Do you know which**  
5 **draft of the clarification letter is being**  
6 **referred to in Daniel's e-mail of**  
7 **September 20, 2008, a.m.**

8 MR. MAGUIRE: I don't.

9 A. I would have to -- it would take me  
10 some time to focus on this, but I don't think  
11 this provision is focused on options positions.  
12 But I'm not that familiar with this portion of  
13 the agreement. It will take me some time and  
14 I'm concerned that evaluating whether his  
15 concern is justified would require me to  
16 interpret these provisions.

17 **Q. Yes, my question is directed not so**  
18 **much to interpretation of provisions, more to**  
19 **your understanding of what the intention of the**  
20 **parties was. Did you have an understanding of**  
21 **what the intent of the parties was?**

22 MR. HUME: I am going to object. That  
23 is a very subtle distinction. Why don't you  
24 ask whether there was a discussion about  
25 those provisions with the other side.

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2 That's a factual question.

3 MR. MAGUIRE: The factual question I  
4 have asked is with respect to Jim McDaniel's  
5 e-mail where he refers to the intention.

6 **Q. And the question is at the time, did**  
7 **you agree with him?**

8 MR. HUME: He has already answered  
9 that.

10 A. I did not agree with him because I did  
11 not think it mattered what was in the agreement  
12 vis-a-vis any concerns he might have -- I should  
13 say in the APA vis-a-vis any concerns that he  
14 might have regarding the scope of the  
15 responsibility that Barclays was undertaking to  
16 OCC.

17 **Q. That's where I said you were moving**  
18 **ahead of me. I wanted to understand the**  
19 **precursor to that. He says --**

20 A. I know, but I have never -- I didn't  
21 analyze it at the time or form a view. I formed  
22 a view that the subject matter was something  
23 that we didn't have to go into.

24 So whether or not he was right, I  
25 could probably form a view, but it would take me  
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2 time that I haven't spent evaluating the concern  
3 that he is raising here and the various  
4 interconnected provisions of the agreement.

5 **Q. You did not --**

6 A. I did not address this. I basically  
7 said it doesn't seem to be relevant, what the  
8 agreement provides in terms of our obligations  
9 to OCC.

10 **Q. Now, he offered a proposed  
11 clarification. Do you see he offers some  
12 language here?**

13 A. He did.

14 **Q. What did you do with that?**

15 A. I don't recall having done anything  
16 with it.

17 **Q. Why not?**

18 A. Because I didn't believe that the  
19 provisions in the asset purchase agreement  
20 affected the undertakings that we were making to  
21 OCC.

22 **Q. You said in your note to him, "What we  
23 agree with Lehman regarding assumed liabilities  
24 and what we agree with OCC are two different  
25 things with potentially different economic**

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2 consequences."

3 A. Right.

4 **Q. Can you explain what you meant by  
5 that?**

6 A. I can. If the position of a customer  
7 was in an account that Barclays had assumed and  
8 executed the TAA and was carrying at the  
9 clearing house, they had economic liability to  
10 the clearing house.

11 If it were the case that as part of  
12 the deal, the liability that Barclays was  
13 assuming to the clearing corporation was a  
14 liability that, in fact, Lehman remained  
15 responsible for, then it was between Barclays  
16 and Lehman for Barclays to be made whole for  
17 whatever its obligation under the TAA was.

18 So for that reason, I didn't think it  
19 was relevant. So it performed an obligation of  
20 a liability that it wasn't assuming, it could  
21 have had a claim over and against Lehman. But  
22 it couldn't have used that claim against Lehman  
23 that it wasn't assuming that liability for  
24 refusing to pay OCC what it owed OCC.

25 **Q. So are you saying that the transfer**

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2 and assumption agreement set forth Barclays'  
3 obligations to the OCC, but did not in any way  
4 affect Barclays' rights under the clarification  
5 letter?

6 **WITNESS' ATTORNEY: Object to the  
7 form.**

8 A. I wouldn't say that they were utterly  
9 unrelated, but I would have said that the  
10 liabilities that it did or didn't assume under  
11 the clarification -- under the deal documents as  
12 reflected in the various agreements overrode the  
13 contractual obligation that it was separately  
14 making to OCC.

15 OCC wanted to know that Barclays was  
16 going to be responsible for every liability that  
17 arose in those accounts and that was the risk  
18 and liability that Barclays was assuming, even  
19 if that meant they were not liabilities that  
20 Barclays was contemplating acquiring from or  
21 assuming from Lehman as part of the deal.

22 **Q. Did you have any discussions with  
23 Mr. McDaniel about that?**

24 A. Just -- my recollection is that -- I  
25 don't recall him coming back to me. There may

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2 be e-mail traffic that you could refresh my  
3 recollection, but I think this was the last of  
4 the discussion of this issue, but I could be  
5 forgetting something.

6 MR. MAGUIRE: We will mark as Exhibit  
7 630 a document Bates stamped OCC 0036482  
8 through 483.

9 (Exhibit 630, document Bates stamped  
10 OCC 0036482 through 483 marked for  
11 identification, as of this date.)

12 **Q. You sent this e-mail to Mr. McDaniel  
13 on Sunday morning?**

14 **WITNESS' ATTORNEY: No.**

15 A. It looks will like I sent it to him  
16 sometime in the afternoon on Sunday.

17 **Q. 3:31 p.m.?**

18 A. Yes.

19 **Q. And you were responding to his e-mail  
20 of just about half an hour earlier? And he is  
21 communicating, the purpose of his e-mail is to  
22 communicate OCC's position to you?**

23 A. Yes.

24 **Q. And he explains that they need the  
25 transaction, the transfer and assumption**

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1 ROSEN  
2 agreement signed, right, and he says over  
3 towards the end of his e-mail on the next page  
4 in the paragraph numbered 3, "If the transaction  
5 does not close tonight, OCC would need to  
6 immediately liquidate and close out the Lehman  
7 accounts and is preparing to do so."

8 Do you see that?

9 A. I do see that.

10 Q. You got back to him in your response  
11 and you say, "Very sorry to keep you hanging."

12 Can you tell me why did Barclays keep  
13 the OCC hanging on the Sunday afternoon?

14 A. Because we didn't think that this was  
15 the most difficult issue to solve and we had  
16 much bigger fish to fry and so I was not able to  
17 turn my attention to this, although what I did  
18 do is forward it on, my recollection, is to a  
19 number of people, including the president of  
20 SIPC because I thought other people would have  
21 more leverage with OCC to get them to calm down  
22 and wait because it was looking less like we  
23 were going to be able to sign up the entire deal  
24 by that night.

25 So I thought it would probably be more

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1 ROSEN  
2 effective for me to spend my time dealing with  
3 the fires we were feeling with and let somebody  
4 else calm them down.

5 Q. When did the Barclays'  
6 representatives, the businessmen make the  
7 decision to authorize the TAA, transfer and  
8 assumption agreement, to the execution of that  
9 agreement?

10 A. I would have to look and see -- I  
11 would have to refresh my recollection of the  
12 e-mails transmitting the drafts to remember  
13 exactly when that was. But I mean, I think it  
14 might have been quite late when I asked Jonathan  
15 Hughes, once we had reached agreement on the  
16 language, whether or not they had sign off from  
17 the business people.

18 Q. And when you say quite late, do you  
19 mean on the near side of midnight or far side of  
20 midnight on Sunday?

21 A. I'm not sure, but it could have been  
22 on the far side of midnight. I may be  
23 misremembering, but my recollection is that the  
24 handling of the documentation of the sort of the  
25 clearing house agreements followed the sort of  
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1 ROSEN  
2 the dealing with the various issues that needed  
3 to be solved, particularly with the DTCC.

4 I was not that concerned because I  
5 think subject to sort of the due diligence and  
6 whatever, we did not have the same problems in  
7 the OCC arrangement that we had with the DTC  
8 arrangement. So I was relatively saying that we  
9 would get there.

10 Q. Who was the decision maker at Barclays  
11 who gave the sign-off authority if you know?

12 A. I don't know who Jonathan Hughes  
13 corresponded with.

14 MR. MAGUIRE: Why don't we take a  
15 break and I may actually be done.

16 (Recess)

17 Q. Sir, you have talked some today about  
18 the margin Lehman maintained at the OCC. Did  
19 you consider that to be an asset that was  
20 related to Lehman's exchange-traded derivatives?

21 A. Yes.

22 Q. What about the margin at other  
23 derivatives exchanges? Did you consider the  
24 margin that Lehman maintained at other  
25 derivatives exchanges to be an asset that was

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1 ROSEN  
2 related to its exchange-traded derivatives?

3 A. If it was part of the FCM business  
4 that they were acquiring or the equity brokering  
5 dealing, trading business, yes.

6 Q. When you say FCM business, you are  
7 referring to futures commission merchant?

8 A. Yes, or the options being an outgrowth  
9 of the equity trading and brokerage business.

10 Q. Now, you mentioned a number of  
11 meetings that you had with various of your  
12 partners to obtain recollection and to prepare  
13 yourself for a number of things; one was your  
14 declaration and another was for this deposition.  
15 Did you also have meetings with your partners in  
16 connection with Jonathan Hughes' preparation for  
17 his deposition?

18 A. I'm trying to remember. I'm not sure  
19 I was involved in Jonathan Hughes' preparation.

20 Q. Did you not meet with Jonathan Hughes  
21 in connection with his deposition?

22 MR. HUME: I am going to object to the  
23 question to the extent there may be  
24 privileged meetings that Mr. Hughes and  
25 Mr. Rosen had that may also have somehow

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<p style="text-align: right;">Page 198</p> <p>1 ROSEN      2 informed the deposition, it may be hard to      3 parse that.      4 <b>Q. I am asking you about whether you met</b>      5 <b>with him where the purpose of the meeting was to</b>      6 <b>help him prepare and get recollections from</b>      7 <b>Cleary partners so he could testify as a</b>      8 <b>representative of Barclays.</b>      9 A. I don't recall participating in the      10 meeting.      11 <b>Q. In any of the meetings that you had</b>      12 <b>with your partners in connection with preparing</b>      13 <b>your declaration, or in connection with</b>      14 <b>preparing for this deposition, in searching</b>      15 <b>people's recollections, did any of your partners</b>      16 <b>suggest that anyone on the Lehman side had ever</b>      17 <b>indicated that margin was not included in the</b>      18 <b>deal?</b>      19 A. No, I don't recall any such statement.      20 <b>Q. You have, I think, the asset purchase</b>      21 <b>agreement in front of you as Exhibit 1. If you</b>      22 <b>could turn to section 1.1, to the definition of</b>      23 <b>excluded assets on page 2 and the one I would</b>      24 <b>like to ask you about is subparagraph N. It is</b>      25 <b>at the top of page 4.</b>  <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p> </p>	<p style="text-align: right;">Page 199</p> <p>1 ROSEN      2 <b>Did any of your partners invite you to</b>      3 <b>address that section of the APA?</b>      4 <b>WITNESS' ATTORNEY: That is a yes or</b>      5 <b>no question.</b>      6 A. No.      7 <b>Q. Did you have any discussion with any</b>      8 <b>of your partners concerning whether margin was</b>      9 <b>an excluded asset under the APA?</b>      10 <b>WITNESS' ATTORNEY: I am going to</b>      11 <b>object on privilege grounds. If you want to</b>      12 <b>ask him for his understanding or discussions</b>      13 <b>with Lehman, that's fine, but his</b>      14 <b>declaration says what it says and --</b>      15 MR. MAGUIRE: Are you directing him      16 not to answer?      17 <b>WITNESS' ATTORNEY: Phrased that way,</b>      18 <b>yes.</b>      19 <b>Q. Let me ask you, sir, did any of your</b>      20 <b>partners describe to you any discussions that</b>      21 <b>they had had with anyone at Lehman concerning</b>      22 <b>the excluded asset in the APA?</b>      23 A. I don't think in our conversations we      24 discussed the definition of excluded assets.      25 <b>Q. Did you have any -- did anyone discuss</b>  <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p> </p>
<p style="text-align: right;">Page 200</p> <p>1 ROSEN      2 <b>any conversation that they had had with anyone</b>      3 <b>at Lehman on that subject?</b>      4 A. That was not the subject of the      5 discussions between us.      6 <b>Q. Let me --</b>      7 A. But it doesn't surprise me that we      8 didn't discuss that because derivatives      9 contracts in that context would have been      10 regarded as relating to the OTC derivatives      11 contracts.      12 <b>Q. Can you explain what you mean by that</b>      13 <b>answer?</b>      14 A. I believe that this reference is      15 intended to be a reference to OTC derivatives      16 contracts.      17 <b>Q. What's the basis for that belief?</b>      18 A. Because it would have been      19 fundamentally inconsistent with the agreement      20 for it to have any other meaning because the      21 derivatives business that was OTC was not part      22 of the deal and the derivatives business that      23 was the listed derivatives and the assets      24 associated with it were.      25 So I think that the natural reading</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>	<p style="text-align: right;">Page 201</p> <p>1 ROSEN      2 that provision is that it was intended to refer      3 to the derivatives business that was not coming      4 over, the derivatives contracts rather than not      5 coming over.      6 <b>Q. When were OTC derivatives excluded?</b>      7 A. I believe they were excluded as part      8 of the original deal as reflected in the APA.      9 <b>Q. Are you referring again to this</b>      10 <b>provision N?</b>      11 <b>WITNESS' ATTORNEY: I am going to</b>      12 <b>instruct him not to answer.</b>      13 MR. HUME: You are asking him to      14 interpret the contract.      15 <b>WITNESS' ATTORNEY: You asked him</b>      16 <b>about business understanding or business</b>      17 <b>deal, he has answered that, and now you are</b>      18 <b>asking him to prove it by asking him where</b>      19 <b>in the contract.</b>      20 <b>Q. When did you learn that the OTC</b>      21 <b>derivatives were not part of the deal?</b>      22 A. I don't remember when I first learned      23 that.      24 <b>Q. How did you learn that?</b>      25 A. I don't remember precisely how I first</p> <p style="text-align: right;">TSG Reporting - Worldwide 877-702-9580</p>

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2 learned it.

3 **Q. Do you know from whom you learned**  
4 **that?**5 A. No. It might have been from reading  
6 the document. It may have been from Jonathan  
7 Hughes. It may have been from one of my  
8 partners.9 MR. MAGUIRE: Sir, I have no further  
10 questions for you at this time.11 MR. GAFFEY: I have just a couple. If  
12 it is OK, rather than have a break, we  
13 should be pretty quick. I am Bob Gaffey,  
14 Jones Day, special counsel to the debtor.

15 EXAMINATION BY

16 MR. GAFFEY:

17 **Q. Earlier today, in response to one of**  
18 **Mr. Maguire's questions, you spoke a bit about**  
19 **conversations you had with Dan Gallagher at the**  
20 **SEC regarding Barclays stepping into the shoes**  
21 **of the Fed in respect to a certain repo. Do you**  
22 **recall that topic generally?**23 A. No, I don't recall having a  
24 conversation with Dan. He may have been one of  
25 the people at the SEC -- I couldn't remember

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2 specifically who I had followed up with at the  
3 SEC.4 **Q. Let me give you a more general**  
5 **question. Whether you remember the particular**  
6 **person you spoke to or people you spoke to at**  
7 **the moment, did you have conversations with**  
8 **people at the SEC about the topic of the repo?**9 A. I had discussions with the SEC about  
10 the need for a waiver by the SEC of certain  
11 rights that it might be construed to have. That  
12 would have affected the ability of Barclays, if  
13 the transaction hadn't closed, to exercise  
14 contractual rights embodied in the documentation  
15 of the repo that they were contemplating  
16 entering into with Lehman, and in the  
17 eventuality that the deal didn't close, I didn't  
18 want Barclays to be in the position where it  
19 wasn't going to be able to exercise all of its  
20 rights under the repo agreement.21 **Q. The repo that you are talking about,**  
22 **was that what has been referred to, you might**  
23 **have heard the term "replacement transaction,"**  
24 **where Barclays stepped into the shoes of the**  
25 **Fed?**

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2 A. This is the transaction where the Fed  
3 unwound its repo, repurchase transaction with  
4 Lehman, and Barclays entered into the repo with  
5 Lehman on purportedly the same assets.6 **Q. What assurances were needed from the**  
7 **SEC with regard to Barclays' rights under that**  
8 **repo?**9 A. It was, because of the possibility  
10 that LBI would have become -- I'm not a SIPC  
11 expert, but I can tell you that my understanding  
12 was that in the event of a SIPC liquidation of  
13 the broker/dealer, that if the broker/dealer had  
14 entered into a repurchase transaction, that  
15 there was some risk -- not saying that it was my  
16 understanding that this outcome was clear, but  
17 there was some potential risk that the ability  
18 to exercise rights of termination, liquidation,  
19 set-off, whatever it is, might have been  
20 something that the SEC would have had an ability  
21 under applicable provisions to have sought a  
22 stay on and we wanted the SEC to agree that in  
23 consideration for Barclays doing this, which it  
24 would probably not otherwise have undertaken to  
25 do in the face of an insolvent counterparty, in

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2 the event that the deal was not going to be  
3 consummated.4 **Q. And when you say applicable**  
5 **provisions, applicable provisions of what, of**  
6 **the Bankruptcy Code?**7 A. I think there are maybe 34 SIPC  
8 provisions. As I said, I'm not an expert.9 **Q. Do you recall, as we talk about this,**  
10 **do you recall who at the SEC you communicated**  
11 **with about this topic?**12 A. That's what I -- I don't remember  
13 who -- I'm sure it is in the -- I'm sure it is  
14 in the e-mails. Well, I suppose -- no, it would  
15 have to be in the e-mails because something came  
16 back from them saying that they would agree to  
17 waive.18 **Q. And the nature of the rights that you**  
19 **were talking about, again as a general matter --**  
20 **I take your point you're not an expert in the**  
21 **area -- but what type of rights were you asking**  
22 **for assurances about in terms of Barclays'**  
23 **exercising its rights under the repo?**24 A. I think they are rights to terminate  
25 the transactions; for example, in the event of a  
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2 default or insolvency set-off claims against  
3 collateral. It would be whatever rights are in  
4 the relevant master repurchase documentation.

5 **Q. Did you review the relevant master**  
6 **repurchase documentation when you had these**  
7 **discussions?**

8 A. I did not.

9 **Q. Who did?**

10 A. I did not.

11 Let me just say something, I received  
12 copies of them. I didn't actually open the  
13 e-mails with those until recently. But in terms  
14 of the risk to Barclays, when the Fed asked them  
15 to do this, one of my colleagues, Sandra Rocks  
16 provided advice to Barclays.

17 **Q. And I am sorry, Sandra --**

18 A. Sandra Rocks.

19 **Q. What is Sandra Rocks' area of**  
20 **specialty?**

21 A. Creditors' rights.

22 **Q. And did Sandra Rocks propose some**  
23 **language, either directly or through you,**  
24 **propose particular language --**

25 A. Yeah, I drafted the language and I

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2 provided it to the SEC and also I believe to  
3 SIPC.

4 **Q. And the rights that were at the center**  
5 **of this discussion had to do with Barclays, as a**  
6 **general matter, Barclays' rights to recover the**  
7 **amounts that it advanced under the repo?**

8 A. I think it would have been whatever  
9 the contractual rights under the terms of the  
10 agreement were.

11 **Q. Did you or anyone on the Barclays'**  
12 **side of the table have any discussions with**  
13 **anyone on the Lehman side of the table or the**  
14 **business people or lawyers about this issue?**

15 A. About the reservation of rights?

16 **Q. Yeah, about, this for lack -- it is my**  
17 **term, not yours -- but about this contingency**  
18 **plan about what would happen if the**  
19 **broker/dealer were liquidated?**

20 A. I don't recall who all the  
21 participants were on the phone. It may very  
22 well have been Lehman and Fed representatives  
23 and Barclays' representatives, but I can't -- I  
24 don't recall for sure.

25 **Q. When you say you don't recall, is it**

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2 because you have a vague recollection someone  
3 were there and you're not sure, or because there  
4 were a lot of phone calls and you can't tell one  
5 way or the other?

6 A. Both.

7 **Q. Were you part of any discussions with**  
8 **Lehman or its representatives at Weil Gotshal**  
9 **about what Barclays' rights would be in the**  
10 **event of the termination of the repo?**

11 A. No. We would have assumed that  
12 they -- that the documents spoke for itself.  
13 They would know from the standard form  
14 documentation.

15 **Q. Are you aware of any discussions**  
16 **where, with Lehman or its representatives at**  
17 **Weil Gotshal, about what, if anything, the**  
18 **documents said that addressed that possibility**  
19 **of a termination of the repo?**

20 A. No, the agreement I think spoke for  
21 itself and they executed it and I don't know who  
22 was involved in the process of approving and  
23 executing the repo.

24 **Q. So we have a clear record, the**  
25 **document you are talking about is the master**

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2 repurchase agreement or the transaction  
3 documents relating to the sale transaction or  
4 both?

5 A. Well, I believe your question was  
6 directed to the master repurchase agreement.

7 **Q. Did, at any point, were you involved**  
8 **in any discussions or to your knowledge was**  
9 **anybody at Cleary -- withdrawn.**

10 To your knowledge, was anybody on the  
11 Barclays' side of the table, Barclays or its  
12 representatives involved in discussion with  
13 Lehman or its representatives about provisions  
14 in the clarification letter that need -- that  
15 addressed the issue of the termination of the  
16 repo?

17 A. I'm not sure, am I the designated  
18 spokesperson -- what I spoke to you about, what  
19 I responded to on the repo was something I  
20 responded to because I was actually directly  
21 involved.

22 **Q. I should have said this up front, I am**  
23 **sorry --**

24 A. I'm not aware --

25 **Q. We have collapsed your deposition into**  
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2 both 30(b)(6) and your individual deposition.  
3 My questions go to your personal knowledge. I  
4 have sort of reversed the rules a little bit.

5 A. I am sorry, could you repeat the  
6 question.

7 Q. Do you have any knowledge of whether  
8 anyone on the Barclays' side of the table,  
9 Barclays or its representatives, spoke to anyone  
10 on the Lehman side of the table, Lehman or its  
11 representatives, about provisions that needed to  
12 be included in the clarification letter  
13 regarding the termination of the repo?

14 MR. HUME: Object to the form.

15 A. I am sorry?

16 MR. HUME: I object to the form.

17 Q. I think you can answer.

18 A. I believe that there may have been  
19 conversations between the lawyers, maybe Alan  
20 Kaplan at Barclays, but I don't have personal  
21 knowledge because I was not involved in the  
22 events leading up to the notice and the  
23 clarification that was made in the clarification  
24 letter.

25 But I assume that -- it is obvious

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2 order, and then we asked SIPC and, I guess it  
3 was Mike Macchiaroli now that I see this, to  
4 confirm that they wouldn't seek such a stay.

5 Q. I can't tell from the e-mail address  
6 with whom or what is Josephine Wang affiliated.

7 A. You can't tell that. I think she is  
8 in the legal department at SIPC.

9 Q. And you say in this e-mail to  
10 Josephine Wang and Steven Sharbeck, Mike  
11 Macchiaroli, "Below is the language we believe  
12 to be necessary to ensure that the order is  
13 sufficiently broad to cover the relevant  
14 Barclays Capital transactions."

15 Do you see that?

16 A. Yes.

17 Q. And below that is some proposed  
18 language and below that is a note that says,  
19 "Mike, I am trying to place us in the document,  
20 are you with me?"

21 Where did the particular language set  
22 off in italics come from, beginning, "Exercise  
23 of any rights," and ending "September 24, 2008"?

24 A. Probably from my colleague, Sandra  
25 Rocks.

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2 that since the provisions were ultimately  
3 included in the clarification letter, that it  
4 was conveyed in the form of the amendments to  
5 the clarification letter that reflected those  
6 provisions.

7 Q. OK. I would like to show you -- let's  
8 mark this as our next exhibit.

9 (Exhibit 631, document Bates stamped  
10 BCI-EX(S) 201894 through 95 marked for  
11 identification, as of this date.)

12 Q. The document I have put before you  
13 Mr. Rosen marked as Exhibit 631 bears Bates  
14 number BCI-EX(S) 00201894 through 895.

15 Have you seen the document before?

16 A. Again, not parsing every word, but it  
17 looks like an e-mail that I sent.

18 Q. And you'll see it is an e-mail from  
19 you to Josephine Wang?

20 A. Yes.

21 Q. I can't --

22 A. This is what I was referring to --

23 Q. It is?

24 A. -- earlier in terms of the sort of the  
25 clarification of the language included in the  
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2 order, and then we asked SIPC and, I guess it  
3 was Mike Macchiaroli now that I see this, to  
4 confirm that they wouldn't seek such a stay.

5 Q. I can't tell from the e-mail address  
6 with whom or what is Josephine Wang affiliated.

7 A. You can't tell that. I think she is  
8 in the legal department at SIPC.

9 Q. And you say in this e-mail to  
10 Josephine Wang and Steven Sharbeck, Mike  
11 Macchiaroli, "Below is the language we believe  
12 to be necessary to ensure that the order is  
13 sufficiently broad to cover the relevant  
14 Barclays Capital transactions."

15 Do you see that?

16 A. Yes.

17 Q. And below that is some proposed  
18 language and below that is a note that says,  
19 "Mike, I am trying to place us in the document,  
20 are you with me?"

21 Where did the particular language set  
22 off in italics come from, beginning, "Exercise  
23 of any rights," and ending "September 24, 2008"?

24 A. Probably from my colleague, Sandra  
25 Rocks.

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2 Q. And was this particular language shown  
3 to or discussed with, to your knowledge, anybody  
4 on the Lehman side of the table, including its  
5 business people or representatives?

6 A. I think that certainly they would have  
7 seen the order in the proposed sale -- the sale  
8 order.

9 Q. Well, you are a bit ahead of me. I  
10 guess I should have asked that. The order that  
11 you refer to, is that the sale order?

12 A. Yes.

13 Q. Do you know if this language wound up  
14 in the sale order?

15 A. I would have to check. I believe so,  
16 but I would have to check to confirm.

17 Q. And in the language that you proposed  
18 in this e-mail, there is a reference to section  
19 559 of the Bankruptcy Code. Do you see that?

20 A. Yes.

21 Q. Were you familiar with the terms of  
22 Section 559 of the Bankruptcy Code when you  
23 proposed this language to the Section and SIPC?

24 A. No, I was the transmitter.

25 Q. Do you know if anyone at -- on the  
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2 **Barclays side of the table, including its**  
 3 **representatives, spoke to anyone on the Lehman**  
 4 **side of the table, including its representatives**  
 5 **about Section 559 of the Bankruptcy Code?**

6 A. I don't have a specific recollection  
 7 of that.

8 WITNESS' ATTORNEY: Mr. Gaffey, let me  
 9 state for the record, for what it's worth,  
 10 the language, the italicized language says,  
 11 "The order that the stays set forth above  
 12 shall not apply to," and I just am not sure  
 13 whether or not that really is referring to  
 14 the sale order as opposed to some other  
 15 order.

16 MR. GAFFEY: Neither am I. That's why  
 17 I asked the question.

18 Q. **Does what your counsel has to say**  
 19 **refresh your recollection?**

20 MR. HUME: I think it is the SIPC  
 21 order.

22 A. Hang on a second. You know what, I  
 23 think you're right. This predated the sale  
 24 order. This is Wednesday -- this is the 17th of  
 25 September, so there was a stay put into place

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2 and I guess this was to seek clarification of  
 3 that.

4 Q. **This refers to the SIPC order, the**  
 5 **SIPA order?**

6 THE WITNESS: Is that the only order?

7 MR. GAFFEY: Let's go off the record  
 8 for a minute.

9 (Recess)

10 MR. GAFFEY: Back on the record.

11 Q. **Mr. Rosen, do you know one way or the**  
 12 **other what order is being referred to? I mean**  
 13 **from memory, do you know one way or the other**  
 14 **what order is being referred to in the document**  
 15 **we have marked as 631, your e-mail?**

16 A. I believe it was in anticipation of  
 17 the sale order, but I'm not 100 percent  
 18 confident.

19 Q. **And how much time -- I know it was a**  
 20 **busy week -- but how much time did you devote to**  
 21 **conversations with the SEC about this assurance**  
 22 **language that's set out in Exhibit 631, this**  
 23 **issue?**

24 A. I really don't have a clear  
 25 recollection. We sent it down to them and I had

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2 a conversation and asked them to focus on it and  
 3 then come back. I think there was -- they  
 4 understood what the import of it was. And then  
 5 they came back and confirmed that they  
 6 wouldn't -- you know, that they agreed they  
 7 wouldn't exercise that right to seek a stay.  
 8 But it didn't take a lot of to'ing and fro'ing  
 9 on the telephone to get there. Their people are  
 10 I think quite familiar with their rights.

11 Q. **Did there come a point that it came to**  
 12 **your attention that the repurchase agreement**  
 13 **was, in fact, terminated?**

14 A. Well, it came to my attention that the  
 15 clarification letter provided for a collapse  
 16 instead of unwinding the repurchase agreement  
 17 and then separately transferring to basically  
 18 collapse that into one step. And it was part  
 19 of -- the collateral that had been under that  
 20 agreement was part of the securities that were  
 21 being sold.

22 Q. **My question is a little different. It**  
 23 **goes to the timing point more than anything**  
 24 **else, but did there come a time when you learned**  
 25 **that the prepurchase agreement had been**

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2 **terminated? And if so, when did you find that**  
 3 **out?**

4 A. Well, with a consummation of the  
 5 transaction, it was terminated.

6 Q. **Do you know when the repurchase**  
 7 **agreement was terminated?**

8 MR. HUME: Objection, asked and  
 9 answered.

10 A. My recollection is that the agreement  
 11 was terminated as part of the consummation of  
 12 the sale transaction.

13 Q. **That would be at the closing on the**  
 14 **22nd?**

15 A. Which would be at the closing.

16 Q. **Did it come to your attention at any**  
 17 **point prior to the closing that Barclays issued**  
 18 **a notice of termination to Lehman?**

19 A. At some point, I did see e-mail  
 20 traffic indicating that a notice had been sent  
 21 in error and then my recollection is that there  
 22 was an effort to document that in the  
 23 clarification letter.

24 Q. **When did the fact of the notice come**  
 25 **to your attention?**

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2 A. I honestly don't recall.

3 Q. **Was it after the sale hearing?**

4 A. I honestly don't recall when I became  
5 aware of it to be honest with you. There is  
6 probably an e-mail somewhere about it. I don't  
7 have a date on it.

8 MR. GAFFEY: OK. Let's mark this  
9 document as Exhibit 632.

10 (Exhibit 632, document Bates stamped  
11 CGSH 163813 through 815 marked for  
12 identification, as of this date.)

13 Q. **I have put before you, Mr. Rosen, what**  
14 **has been marked as Exhibit 632 document bearing**  
15 **Bates number CGSH 00163813 through 815. Take a**  
16 **look at the document, please, sufficient to tell**  
17 **me whether you have seen it before.**

18 A. Yes, it looks like the e-mail  
19 correspondence to which I was a party.

20 Q. **Does this e-mail constitute the**  
21 **assurance that had been requested from the SEC?**

22 A. Yeah, I believe this is.

23 Q. **And had you spoken with Alastaire**  
24 **Bambach about the topic?**

25 A. I don't recall. It is possible that

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2 he -- that I did or that he was on the phone  
3 when I spoke to someone regarding it. I  
4 honestly don't have a clear recollection. There  
5 was so many conversations with the SEC.

6 Q. **And you asked Alastaire in the e-mail**  
7 **at the top of the chain, an e-mail dated**  
8 **September 18, 2008 at the time of 4:01 p.m. -- I**  
9 **beg your pardon, the time of 3:59 p.m.**  
10 **Alastaire, "Is this comfort something that we**  
11 **may share with others who may have an interest."**  
12 **Do you see that?**

13 A. Yes.

14 Q. **Who were the others you are referring**  
15 **to?**

16 A. I'm looking at that and I don't recall  
17 specifically whether this was sort of just a  
18 general, abstract question or whether I had  
19 somebody in mind. I honestly don't recall  
20 sitting here today.

21 Q. **And did you share this comfort with**  
22 **others?**

23 A. I think I probably shared it with the  
24 client certainly.

25 Q. **Did you share it with anybody at Weil**  
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2 **Gotshal?**

3 A. I don't recall providing it directly  
4 to Weil Gotshal.

5 Q. **Do you know if it was provided**  
6 **indirectly to Weil Gotshal?**

7 A. I don't have a recollection about  
8 that. It may have been. I do not. It may have  
9 been that I did this because the client at  
10 Barclays wanted to forward it on and they asked  
11 me whether they could. But I just -- but  
12 honestly, this is not a keen recollection.

13 Q. **Do you have any knowledge, direct or**  
14 **indirect, as to whether this comfort language**  
15 **was shared with Lehman or Weil Gotshal?**

16 A. I really don't recall.

17 Q. **You referred a few times today in**  
18 **various contexts to -- you can put the document**  
19 **aside. To various circumstances where -- and**  
20 **this is, again, not a quote, but you talked**  
21 **about jeopardy to the deal closing by Monday the**  
22 **22nd, that's a prospect that you have talked**  
23 **about a few times today. Was there a drop-dead**  
24 **date for closing?**

25 A. No, there was just a perception that

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2 if it didn't close by Monday, there could be  
3 developments in the marketplace which might have  
4 complicated or prevented the deal from getting  
5 done. I don't think it was an ultimatum.

6 I think people wanted to get the deal  
7 done, but I think there was a concern that  
8 letting another business cycle go by was just --  
9 because we didn't know what was going to happen.  
10 I think this was the weekend where we had  
11 learned very late Sunday night that, you know,  
12 Morgan Stanley and Goldman Sachs had quite  
13 expeditiously become banks and people were  
14 worried and the hurry to do that was no doubt in  
15 part due to concerns.

16 So I wouldn't say that it was a drop  
17 dead or an ultimatum or anything like that. It  
18 was that people realized it became more  
19 complicated and there was more noise that could  
20 interfere with the transaction the more time  
21 that elapsed. So we all, I think internally at  
22 Cleary regarded it as, put it this way, if the  
23 deal wasn't ready to close on Monday, we didn't  
24 want to be the ones responsible for it not being  
25 ready to close on Monday morning, so we took it

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2 seriously.

3 **Q. That issue aside, the deal could have  
4 closed on Tuesday?**

5 A. Theoretically, it could have closed on  
6 Tuesday if things hadn't intervened. It was  
7 more the risks that were associated with not  
8 closing expeditiously that were the concerns.  
9 You had to remember, the markets were very  
10 volatile and there were assets whose valuation  
11 was the source of considerable uncertainty and  
12 concern.

13 MR. GAFFEY: I don't have anything  
14 further. Thank you for your time.

15 MR. DAKIS: The committee has no  
16 questions.

17 THE WITNESS: Thank you.

18 (Time Noted: 4:35 p.m.)

19 

---

20 EDWARD J. ROSEN

21 Subscribed and sworn to  
22 before me this EDWARD J. ROSEN day  
23 of February, 2010.

24 

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11 Exhibit 624 document Bates stamped DTCC 122  
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2 EXHIBITS

3 Exhibit No. Marked  
4 Exhibit 631 document Bates stamped 213  
5 BCI-EX(S) 201894 through 95  
6 Exhibit 632 document Bates stamped CGSH 220  
7 163813 through 815

1 ROSEN  
2 CERTIFICATE  
3 STATE OF NEW YORK )  
4 )ss:  
5 COUNTY OF NEW YORK)

6 I, MARY F. BOWMAN, a Registered  
7 Professional Reporter, Certified Realtime  
8 Reporter, and Notary Public within and for  
9 the State of New York, do hereby certify:

10 That EDWARD J. ROSEN, the witness  
11 whose deposition is hereinbefore set forth,  
12 was duly sworn by me and that such  
13 deposition is a true record of the testimony  
14 given by such witness.

15 I further certify that I am not  
16 related to any of the parties to this action  
17 by blood or marriage and that I am in no way  
18 interested in the outcome of this matter.

19 In witness whereof, I have hereunto  
20 set my hand this 19th day of February, 2010.

21 

---

22 MARY F. BOWMAN, RPR, CRR  
23  
24  
25

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2 \* \* \*ERRATA SHEET\* \* \*

3 NAME OF CASE: In Re: Lehman Brothers

4 DATE OF DEPOSITION: February 19, 2010

5 NAME OF WITNESS: EDWARD J. ROSEN

6 Reason codes:

- 7 1. To clarify the record.
- 8 2. To conform to the facts.
- 9 3. To correct transcription errors.

9 Page \_\_\_\_ Line \_\_\_\_ Reason \_\_\_\_  
From \_\_\_\_\_ to \_\_\_\_\_

10 Page \_\_\_\_ Line \_\_\_\_ Reason \_\_\_\_  
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